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Vardaman S. Dunn

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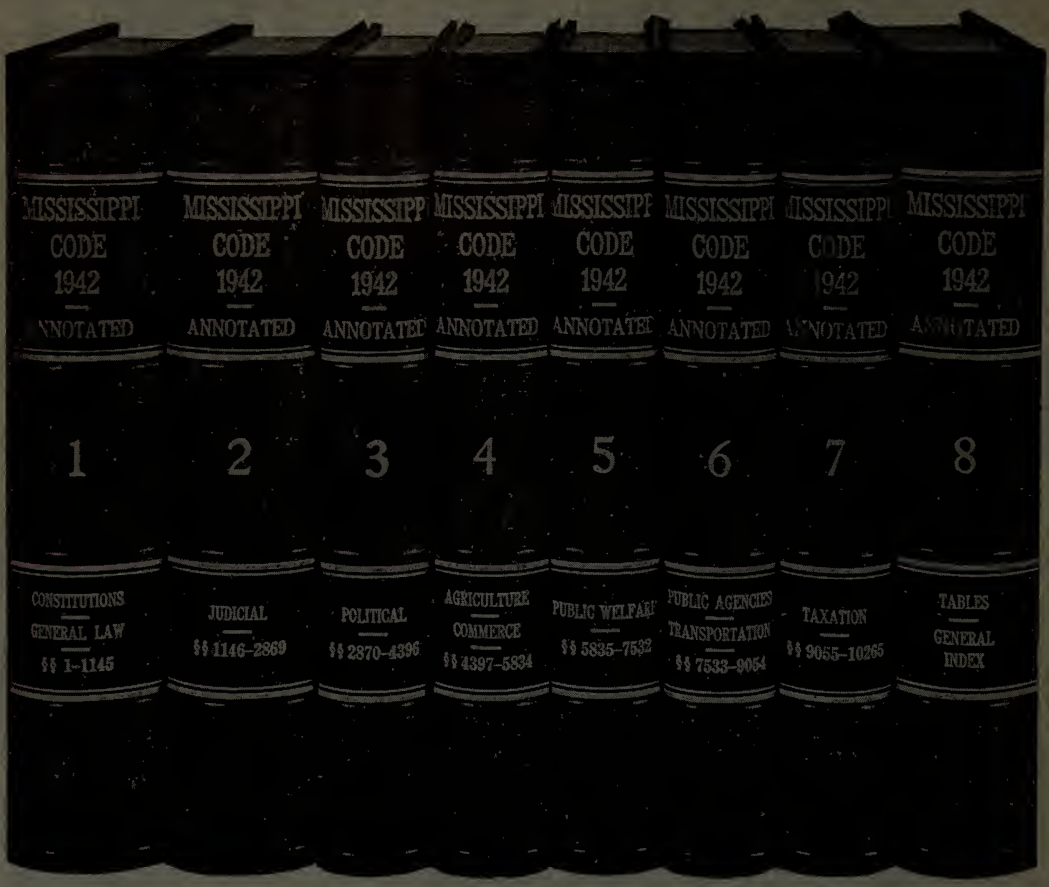

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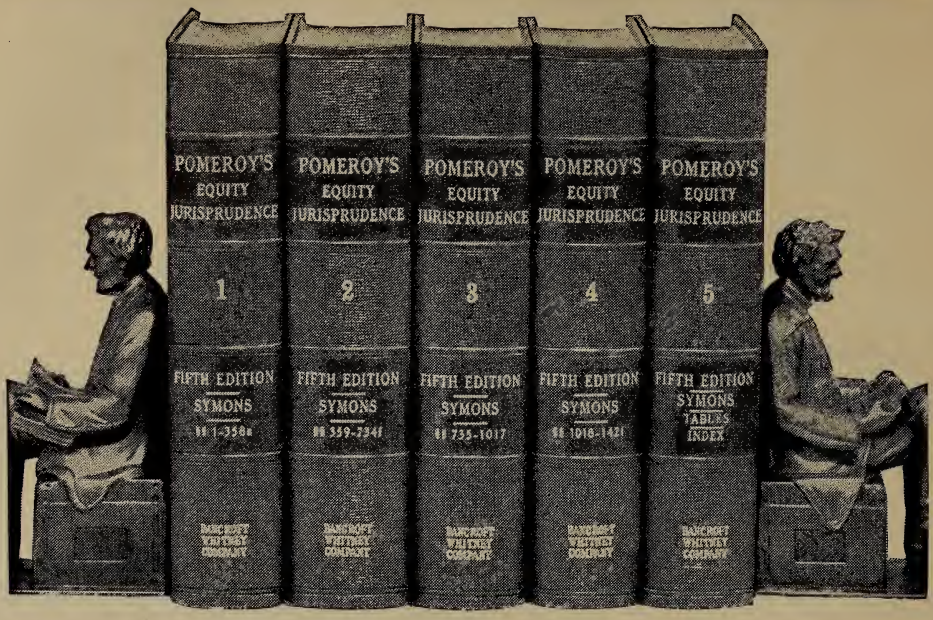

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JOURNAL OF THE MISSISSIPPI STATE BAR

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WHAT SHOULD BE THE FUNCTION OF THE STATES IN OUR SYSTEM OF GOVERNMENT?

*Urban R. Miller**

The founding fathers were educated in the democracy of the common village and the town meeting. Colonies were grouped by religious and national ties, the menace of outside enemies, and economic interdependence. Ethnic and geographic factors accounted for provincialism on the one hand and the unification of each colony on the other. Such development was natural under the conditions of transplanting peoples of different political backgrounds in a wilderness.

And so in the second article of the Articles of Confederation[1] was embodied not only political thought of the eighteenth century, but the political experience of small settlements of people who had migrated in search of personal freedom and who were out of touch with political philosophy of the day.

The debates attending adoption of the Constitution centered largely around the implications of the states' rights question. Hamilton assured the colonies that the Constitution, minus the Tenth Amendment, guaranteed adequate local autonomy.[2] And Madison illustrated rather minutely how that autonomy was protected from encroachment by the federal government.[3] But their assurances were not enough for people who had first

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*Williams, Arizona. A. B., LL. B. Member of the Iowa and Arizona Bars

[1]"Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and Right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

[2]". . . It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty." The FEDERALIST, No. XVII.

[3]". . . should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where

learned by experience to guard their political liberties and then tasted lustily of freedom. Those people were unwilling to leave as vital a principle as states' rights to chance or judicial construction. So to meet a condition of ratifying the Constitution imposed by the states, the Tenth Amendment was enacted as a written guarantee:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

But while the states were being satisfied with this reservation of powers, there was delegated to the federal government powers, some of which are known as police powers, whereby it was destined to control many of the internal affairs of the states: monoply of the postal service, the powers to tax and to spend money, the power to regulate interstate and foreign commerce, and implied power to legislate for the general welfare. Thus out of the post-war economic crisis the states united to form a dual or federal state system of government with a sovereign national body, reserving to the states broad fields of local automony as well as the function of acting as agents in certain respects for the federal government. The federal government can exercise only those powers expressly or by necessary implication delegated to it, while the states exercise all powers not delegated to the federal government or by necessary implication denied them.[4] The Constitution, federal law and treaties are supreme. Where federal and state governments have concurrent power, and where state and federal powers conflict, the states yield to the supremacy of federal authority. Acting alone the federal government cannot amend the Constitution.

A constructive period of our constitutional history followed the adoption of the Constitution. Under the guidance of Marshall and Story

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the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

"But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be conncerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity . . ." *Id.* No. XLVI.

4" . . . The preservation to the people of each State of this inherent right of regulating 'the internal government and police thereof' was, to the framers of the Constitution, of equal importance with the establishment of a National Government . . . The framers knew from experience, and they intended to preserve the principle, that a local government is a responsible government—a government which can never long be conducted in defiance of the opinions, desires, or prejudices of the governed; they knew that a distant and centralized government had been and could be conducted otherwise; and they were not inclined to authorize such a central government to interfere with or administer their local affairs unless absolutely necessary for the safety, welfare, and permanence of the Nation as a Nation." WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT (1935) 26-27.

federal and state powers and functions were judicially defined to strengthen the federal state system.[5] The states were sovereign within their sphere. Soon followed the principles that the power to regulate purely internal matters rest exclusively with the states whether they exercise such power or not,[6] and that in matters essentially national in character and requiring uniformity of treatment the exclusiveness of federal power arises *per se* from the very grant.[7] Nevertheless it was Marshall's theory that the reserved powers of the states are not fixed and unyielding, but consist of those which are left after the rule of implied federal powers has been applied in the light of existing conditions. Thus circumscribed, local issues were to be kept independent of those of the nation. But political institutions are not static; little in a growing democracy is unchanging. And so during the first century states' rights doctrines evolved from those of *McCulloch v. Maryland* and *Gibbons v. Ogden* in a spiral[8] to the extreme of the Granger movement.

Thence came expansion of the nation to the west along political structure lines contrary to those which had influenced the Articles of Confederation and the Constitution. Settlement of the Mississippi Valley and the west under the township system forced people into uncongenial racial, religious and social surroundings that disregarded premigration backgrounds. Villages and sections of the same state grew up side by side with few local interests in common. In solving their diversified and conflicting domestic problems the new states were unable to make full use of the rights which the Supreme Court now said were reserved to them by the Tenth Amendment. Consequently as local government lost its vitality and deteriorated toward national functions, the frontier and the cities became increasingly aware of the expansive field wherein the federal government could cross state lines with uniform legislation.[9]

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[5]Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440 (1793); Fletcher v. Peck, 6 Cranch. 87, 3 L. ed. 162 (1810); Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97 (1816); Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529 (1819); McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (1819); Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257 (1821); Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824); Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678 (1827); Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25 (1831); Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672 (1833).

[6]Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (1824); Willson v. The Blackbird Creek Marsh Co., 2 Pet. 245, 8 L. ed. 412 (1829); City of New York v. Miln, 11 Pet. 102, 9 L. ed. 648 (1837); Cooley v. Board of Wardens, 12 How. 218, 13 L. ed. 1004 (1851).

[7]Willson v. The Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412 (1829).

[8]*See* City of New York v. Miln, 11 Pet. 102, 9 L. ed. 648 (1837); The License Cases, 5 How. 504, 12 L. ed. 256 (1846); Cooley v. Board of Wardens, 12 How. 318, 13 L. ed. 1004 (1851); Bowman v. Chicago & N. W. Ry., 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689 (1888).

[9]Patten, *The Decay of State and Local Governments* (1890-91) 1 ANNALS 26-39. One indication of this trend is the fact that the newer state constitutions show a decrease in the powers of the states. Burgess, *The American Commonwealth* (1886) 1 POL. SCI. Q. 9-35. See also Dodd, *The Decreasing Importance of State Lines* (1941) 27 A. B. A. J. 78, 80.

THE BEGINNING AND GROWTH OF FEDERALISM

However, the first anniversary of the Constitution saw the states' rights cycle end and the cycle of federalism begin. The Civil War had ended the doctrine of state secession and with it went many attributes of state sovereignty not associated with the issue of the war. The movement continued modestly but effectively with abandonment of the states' rights doctrine in interstate commerce of the Granger cases.[10] Except for a states' rights victory in partial nullification of the Fourteenth Amendment by the Supreme Court,[11] during the years following the Civil War not only was judisdiction over problems national in character given back to the federal government but by extension of the doctrine of implied national powers the reserved powers of the states were otherwise curtailed. Complex urban and industrial life demanded more governmental services than the simple rural life which it replaced. But local governments were unable to provide many of these services. So a federal-state-local relationship developed.[12]

The change was wrought largely by the prerogative of the federal government in the field of interstate and foreign commerce. This was accomplished in part by accelerated legislative activity by the federal government in exercising its power to regulate interstate and foreign commerce, and in part by a progressive broadening by constitutional interpretation of the scope of federal powers, particularly again the power to regulate interstate commerce.[13] At the same time social and economic control was grasped through exercise of the federal taxing power for police purposes[14] and by means of the federal spending power as an adjunct to the general wel-

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[10]Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636 (1886); Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244 (1886); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1151 (1913); Houston, East & West Texas Ry. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341 (1914).

[11]Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394 (1873); Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835 (1883).

[12]Bromage, State Government and Administration in the United States, p. 416 *et seq.* The reaction from the high point of the states' rights movement was by judicial amendment of the Constitution, since only by the Twelfth, Fourteenth and Seventeenth Amendments have the states lost national functional powers by constitutional amendment. The trend was accelerated by the World War and the subsequent period of social unrest. The present war is hastening it still more.

[13]Chicago Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1923); Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518 (1905); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511 (1913); Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 35 Sup. Ct. 833, 58 L. ed. 1341 (1914); Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397, 66 L. ed. 735 (1922).

[14]McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. ed. 78 (1904); United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493 (1919); Nigro v. United States, 276 U. S. 332, 48 Sup. Ct. 388, 72 L. ed. 600 (1928); Hampton v. United States, 276 U. S. 394, 48 Sup. Ct. 348, 72 L. ed. 624 (1928); *see* Cushman, *Social and Economic Control Through Federal Taxation* (1934) 18 Minn. L. Rev. 759. *Cf.* Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449, 66 L. ed.

fare clause.[15] Through expansion of these powers, the federal government has regulated matters denied it in the direct grants of legislative power.[16] Then during the past decade crime has been organized on a national scale, with the result that it has become a problem of national concern, and the jurisdiction of the states correspondingly maligned.

We cannot have an effective national policy in any field based on the action of states which exist largely as historical units. A unified economy requires unitary government in that particular field. So in meeting the demands of the economic emergency of the 1930's, the executive, legislative and judicial branches of the federal government acted to put an end to a great many states' rights which remained as far as economic utility is concerned only as remnants of federalism.[17] The states have ceased to perform many functions independently and now act concurrently with the federal government, or surrender entirely to the aggressiveness of the federal government. By virtue of its centralization and greater financial resources the federal government has the controlling advantage in the performance of those functions over which the exercise of concurrent powers is still practicable.

THE PROBLEMS CHEATED

Since activity by the federal government in the field of general welfare is, under the present conception, no longer an encroachment upon states' rights, but a permanent order, there is apprehension as to the destiny of the states as functional units in our system of government and the procedure necessary to re-endow them with proper functional prerogatives. While there may be philosophic differences between political function and

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817 (1922); and Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1922), wherein the Child Labor tax of 1919 and the Future Trading Act of 1921, respectively, were held unconstitutional on the ground that congressional power was exercised by the imposition of a penalty instead of the levying of a tax.

[15]"The power of Congress to authorize expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution." United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 319, 80 L. ed. 477 (1936). *Cf.* Carter v. Carter Coal Co., 298 U. S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936) (in invalidating the Bituminous Coal Conservation Act of 1931, it was held that since the federal government is one of delegated powers, it has no general police power to pass regulations for health, safety, morals and general welfare). See Holmes, *The Federal Spending Power and State Rights* (1936) 34 MICH. L. REV. 637.

[16]Magnano Co. v. Hamilton, 292 U. S. 40, 54 Sup. Ct. 599, 78 L. ed. 1109 (1934); *see* United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 319, 80 L. ed. 477 (1936). See also generally THOMPSON, FEDERAL CENTRALIZATION (1923); 1 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES § 62. Indeed it has been suggested that through the spending prerogative Congress may *force* states to comply with regulation of matters otherwise reserved to them. Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923).

[17]"The fact developed quickly that the states were unable to give the requisite relief . . . There was need for help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare." Steward Machine Co. v. Davis, 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279 (1937).

political power, under our system one implies the other.[18] However, function means more; it means integral duty. It means to an end.

The problems and their ramifications are obvious. Should we revivify state functions lost? Or should we create new state functions? In either event, should we individualize or socialize the states? On the one hand we have those who would reduce the states to the status of English counties. On the other hand we have the regionalists.[19] There is still the dogma of states' rights which originally reduced the powers of the federal government to a minimum, which almost defeated adoption of the Constitution, and which plunged the nation into the Civil War.[20] And at one extreme there is the present tendency from sectional to class politics. Consideration of these questions should be directed, first, to the states as component parts of regional divisions or movements, and second, to the states as separate political entities.

REGIONAL UNIFICATION OF STATE FUNCTIONS

Illogical as the location of state lines may be from the standpoint of geography and social and economic utility, they are not for that reason to be erased or redrawn.[21] That the advocates of regionalism are supported by the arguments of modern science, and are opposed as far as the *status quo* of the states is concerned largely by history and tradition, can hardly be gainsaid. But history and tradition cannot be too lightly considered or casually abandoned. Instead, we should have constructive regional action by groups of states with common interests,[22] still retaining the politically orientated state as the key unit.[23] With the proper authority and precedent much could be accomplished in this respect by organized cooperation between the states under the compact clause of the Constitution,[24] in fact, some feel that we have recently gone far in that direction.[25]

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[18]See, however, criticism of *United States v. Butler* by Charles S. Collier, *Judicial Bootstraps and the General Welfare Clause—The AAA Opinion* (1936) 4 GEO. WASH. L. REV. 211, 224: "The basic criticism of the position of the majority that the present writer wishes to advance, is that the Tenth Amendment does not reserve to the states particular *subjects* or *fields* of governmental action, but only reserves to the states *powers*. The purpose of the Tenth Amendment is to reserve to the states certain *powers to act,* namely, those which have not been granted to the United States . . ."

[19]See generally ODUM and MOORE, AMERICAN REGIONALISM (1938).

[20]See United States v. Darby Lumber Co., 312 U. S. 100, 61 Sup. Ct. 451, 85 L. ed. 395 (1941), and the comments thereon by A. H. Feller, *The Tenth Amendment Retires* (1941) 27 A. B. A. J. 223.

[21]" . . . No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass . . ." McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 (1819). See generally Ritchie, *The Constitution and the States,* ANNALS, May, 1936.

[22]Cooperation of seven states in arguing before the Supreme Court for the Guffy Coal Act in Carter v. Carter Coal Co., 298 U. S. 239, 56 Sup. Ct. 855, 80 L. ed. 1160 (1936), may be cited as an example.

[23]ODUM, SOUTHERN REGIONS OF THE UNITED STATES, 533.

[24]Lewis, *Regionalism, A Plan of Uniting the States More Effectively* (1923) 89 FORUM 136.

[25]CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1938) 70.

Interstate Compacts

Two or more states may, with the consent of Congress, enter into a compact.[26] Until recent years this power has been exercised only sparingly and for the most part in questions requiring a single and final decision, such as in boundary disputes, rather than a continuing series of decisions and adjustments. This was due to the fact that the execution of an interstate compact is a long tedious process, and its enforcement, although possible in some instances,[27] is no less difficult.

Notwithstanding the tedium in the execution of interstate compacts, with the recent growth of federalism the states have begun to realize that possibilities exist in such procedure,[28] and that by it some local and regional functions can be kept free from encroachment by the federal government. For instance, in 1922 six states in the Colorado River basin entered into an agreement for the distribution of the waters of the Colorado River, demonstrating in spite of the attending delay and litigation, the utility of interstate compacts in the field of conservation of natural resources. It was thence a long step from the common application of the interstate compact to waterways, bridges and state boundaries, to the compact entered into in 1934 by seven northeastern states for the regulation of minimum wages for women. This is additionally significant in view of the fact that the field of labor legislation is one rather thoroughly occupied by the federal government. In the same year Congress gave its general consent to agreements between states providing for mutual assistance and effort in enforcement of criminal laws.[29] Even the right to tax, the most jealously guarded state prerogative, has been made the subject of a compact entered into by Missouri and Kansas.[30] Where interstate compacts were orginally used exclusively in settling political controversies, they

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[26]U. S. CONST., Art. I, § 10. By means of such compacts the federal government may reach objectives denied it as a matter of express legislative power. Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. ed. 103 (1892); Ward v. Race Horse, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. ed. 244 (1896); Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162 (1900); Arizona v. California, 283 U. S. 423, 51 Sup. Ct. 522, 75 L. ed. 1154 (1931).

[27]In 1935 seven oil producing states entered into a compact by which it was agreed that each state would enact legislation for the conservation of oil and gas by the prevention of unavoidable waste. But there being no way to fix financial responsibility for the violation of the compact, how could it be enforced? See, however, Virginia v. West Virginia, 246 U. S. 565, 38 Sup. Ct. 400, 62 L. ed. 893 (1918), wherein it was held that Congress has power to create judicial remedies necessary to compel a defaulting state to keep the obligations of an interstate compact. While in this case the Court held that as a result of taking cognizance of the controversy over the amount of money due, it had jurisdiction to enforce a money judgment in the case, that does not mean it could enforce a compact like the one mentioned.

[28]See Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 YALE L. J. 685.

[29]48 STAT. 909 (1934), 18 U. S. C. A. 420 (1934).

[30]Missouri and Kansas have agreed that neither will tax the properties of municipal waterworks located in the two states around Kansas City. State v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924); Kansas City, Mo. v. Fairfax Drainage Dist., 34 F. (2d) 357 (C.C.A. 10th, 1929), *cert. den.*, 281 U. S. 722, 50 Sup. Ct. 237, 74 L. ed. 1140 (1930).

are now being used to conserve natural resources and are being tried in the field of social and economic reform.

Federal-State Compacts

Akin in principle, if not in consequence, is the so-called "federal grants-in-aid" whereby a quasi-contractual relationship is entered into by the federal government and states. This takes the form of federal subsidy of a function, matched by each of the cooperating states appropriating specified sums of money toward the same end. The highest point yet reached in this type of compact is in the Social Security Act, one purpose of which is to motivate the states to action in the fields of old age pensions, public health, vocational rehabilitation, maternal and child welfare and unemployment insurance.[31]

While this procedure contains most of the objectionable elements of federal control over state functions by means of the taxing and spending powers, it promotes increased activity by the states, sometimes through cooperation with each other, more often through cooperation with the federal government.[32] Usually general welfare measures enacted by the federal government emphasize and invite local responsibility and participation. As administrative subordinates, the states are responsible for success of the program adopted. In any event acceptance of a subsidy is optional with a state.[33] A state's sovereignty is not jeopardized by its refusal of Congressional largess.

FUNCTION OF THE STATES IN REGIONAL POLITICAL ACTIVITY

Many governmental functions, except in the field of foreign relations, the waging of war, regulation of foreign commerce, immigration, the coining of money, and the regulation of patents, are complicated by variable regional factors. But in our system of government a region encompassing more than one state cannot and should not exist as a political

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[31]See Steward Machine Co. v. Davis, 301 U. S. 548, 57 Sup. Ct. 883, 81 L. ed. 1279 (1937) (holding that motive or temptation is not coercion).

[32]See Howard v. Ingersoll, 13 How. 381, 14 L. ed. 189 (1851); Alabama v. Georgia, 23 How. 585, 16 L. ed. 556 (1860); Central R. R. of N. J. v. Jersey City, 209 U. S. 473, 28 Sup. Ct. 592, 52 L. ed. 896 (1908); Massachusetts v. New York, 271 U. S. 65, 46 Sup. Ct. 357, 70 L. ed. 838 (1926). "The need is for some kind of device that will combine state control with national leadership. Federal aid meets that need." MacDonald, Federal Aid (1928) 12. See also Corwin, *op. cit. supra* note 25, at 72.

[33]See Collier, *supra*, note 18, at 237. "It may be admitted at this point for purposes of argument that there would be a real invasion of states' rights if such proceedings as those contemplated by the Agricultural Adjustment Act were taken against the declared will and the established policy of the state. But if the state is silent and acquiescent, it is possible to regard the field of contract and expenditure as one that is controlled by state laws in the regulatory sense, but which may be entered by the Federal Government through the method of contract with private parties, the expenditure of money and the presentation of economic inducements, so long as these do not point to results which the state law, dominant in the field, inhibits."

entity,[34] only as a sphere of influence dictated by the states acting as political entities in agreement with each other.

It should then be the function of the states in regional political activity to exercise those powers, consistent with larger regional considerations, necessary for the unification of the regional economy, the development of their physical and human resources, and the increase and distribution of wealth. They should enjoy their powers in that respect unhampered by federal regulations enacted on compromise between the needs of forty-eight diverse states or to regulate interstate commerce of nationwide proportions. And in like manner they should be unhampered, except by their agreements with each other, in selecting the methods by which they perform that function, whether by direct regulation, taxing, subsidy, or other. Some of those powers they would exercise in cooperation with neighboring states; in others neighboring states would have no interest.

In the fields of labor,[35] agriculture,[36] education, mining, public utilities, urbanization of population, highways and tariffs, regional action could be taken by interstate agreement providing variable standards or optional ways by which an individual state could meet a standard.[37] The alternative offered should protect a state within the region from the economic disadvantage of having to compete with the lower standards of a neighbor, since the principle means by which men make their living—industry, agriculture, natural resources—are less likely to shift from region to region than from state to state.

The future will no doubt prove that the federal government, large and powerful as it is becoming, is ill-equipped to centralize large-scale and detailed planning.[38] The readaption of the states to these functions as regional responsibilities would leave the federal government with

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[34]The nearest thing we have to a regional entity is the TVA, one purpose of which is "planning for the complete Tennessee River watershed, including erosion control, forestation, the further use of mineral resources, the promotion and coordination of industry and agriculture, surveys and plans for the proper use of land and other natural resources, and the general social and economic well-being of the valley." UNITED STATES GOVERNMENT MANUAL (1934) 271.

[35]Hard, *The States Should Umpire the Picket Line* (1942) 42 READERS' DIGEST 83.

[36]*See* United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936): "We are not now required to ascertain the scope of the phrase 'general welfare of the United States,' . . . Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government."

[37]The compact of 1934 by seven northeastern states for regulation of wages paid women provides for the passing of enabling laws by the states wherein the standard set up in the compact would be met. Questions arising from state laws enacted under the compact are referred to an interstate commission which, however, acts in an advisory capacity only.

[38]ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM (1935) 185.

power to control and regulate interregional commerce as far as necessary to unify it into a national whole, with financing and production control decentralized. Regulation of the balance between industrial production and consumption should be accomplished by regional control of production and national promotional measures directed toward increased consumption. Likewise standards of agricultural production having been set by interstate action, increase of consumption, as well as the fixing of industrial and agricultural parity, leave a field for the coordinating facilities of the federal government.[39] The federal government might best provide the insurance and financial guarantees of social security standards, including those of the labor titles of the social security program, as well as workmen's compensation for industrial accidents and diseases.[40] It may be that child labor problems could be solved by states in regional cooperation. Standards in a social security program would, of course, be predicated upon geopolitic considerations.[41] Banking and private financing problems not being complicated by sectional factors, except as the concentration of industry concentrates capital, national stability in private credit is a function that accompanies the federal power over money. With private finance decentralized nationally, adequate capital would be made available for regional conservation and development of natural resources. State barrier legislation is a matter of regional concern. Its integrity should be recognized and guaranteed by the federal government as in the Twenty-first Amendment. In these fields, the federal government should cooperate with states through regional influence and act less upon the individual citizen.

FUNCTION OF THE STATES AS INDIVIDUAL ENTITIES

This functions of government may be generalized as *necessary* and *optional,* or those exercised habitually and without objection by all governments, and those about which there is difference of opinion as to whether governments should exercise them or not.[42] The first class, which we accept as within the sphere of the states, is composed almost exclusively of (1) the political functions delegated to the states, and (2) the functions of general law and administration, the field reserved to the states with

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[39]ODUM and MOORE, *op. cit. supra* note 19, at 638.

[40]See Coolidge, *Remember the States* (1940) 165 ATLANTIC 89, 92: ". . . If certain taxes can be better obtained by central administration, then let the Treasury collect these taxes and distribute pro rata, according to population, to the states, but let not presidential appointees, nor even the Congress, determine for what purposes this money shall be spent . . ."

[41]"How much simpler the administration of the new social security program would be if the National Government could deal with nine or ten regional governments instead of forty-eight state legislatures!" Munro, *Regional Governments for Regional Problems,* ANNALS, May, 1936. See also Dodd, *supra* note 9, at 82.

[42]MILL, POLITICAL ECONOMY (1900) 301. "One of the most disputed questions both in political science and in practical statesmanship at this particular period, relates to the proper limits of the functions and agency of governments. At other times it has been a subject of controversy how governments should be constituted, and according to what principles and rules they should exercise their authority;

now no extra-legal or extra-constitutional trespass by the federal government. Within the optional class we find functions of this kind so recently added to the sphere of the federal government: authoritative interference for the purpose of controlling the free agency of the individual in the doing of things toward which the states had held to a policy of *laissez-faire,* and the establishment of governmental agencies to engage in pursuits originally entrusted to private enterprise.

Necessary Functions

Political Functions of the States

The political functions of the states are listed as those prerogatives to act with regard to the basic organization of the federal state system of government.[43] They are enumerated in the Constitution: choosing presidential electors, granting or withholding the elective franchise, forming congressional districts, holding congressional elections, regulating and fixing the method of holding elections. The Constitution cannot be amended except as the states either initiate amendments or ratify amendments proposed by Congress. The federal government is dependent upon the states for the performance of these duties. Within the sphere of its political functions the state is truly sovereign.[44]

In the Field of General Law and Administration

The class with which we are now most concerned includes the general domain of what we call civil and criminal law and administration—the contractual and domestic relations of people with each other, and with the state which acts both as an entity with its own rights and as umpire in the relations between individuals. What we accept as general law touches the life of the individual at so many points that a society without such a code in some form is inconceivable. For instance, laws governing the acquisition, use, disposition and descent of property are basic, found even among uncivilized people, and among the most important administered by our states. Enacting and administering preventive and protective law are exclusively state functions.[45] This comprehends contracts, guardianship and trusteeship, laws fixing requisites to the forming of contractual relations,

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but it is now almost equally a question, to what departments of human affairs that authority should extend. And when the tide sets so strongly towards changes in government and legislation, as a means of improving the condition of mankind, this discussion is more likely to increase than to diminish in interest . . ." *Id.* at 300.

[43]Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. ed. 913 (1921).

[44]The Collector v. Day, 11 Wall. 113, 20 L. ed. 122 (1870).

[45]Subject, however, to the war powers of Congress, Baird v. United States, 179 Fed. 509 (C. C. A. 6th, 1922), and the power of the federal government to make treaties with foreign nations. Ware v. Hylton, 3 Dall. 199 (U. S. 1797); Fairfax v. Hunter, 7 Cranch 603 (U. S. 1813); Chirac v. Chirac, 2 Wheat. 259 (U. S. 1817); Latimer v. Poteet, 14 Pet. 4 (U. S. 1840); Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628 (1880). Then in a more local atmosphere we lose state functions, since

employer's liability laws, lien, usury and recording laws, laws against force and fraud, public policy enactments—in brief, laws guaranteeing the security of person and property against all but purely economic hazards.[46]

It is in this field, where the federal government cannot enter and where regional spheres of influence have no reason to enter, that the states can function best as individual entities. The field is so commonplace, and one in which no spectacular movements take place for social or economic betterment, that little thought is given to its function or utility. In spite of the recent preempting of state functions by the federal government, the state still remains the political entity that most completely regulates the daily lives and conduct of citizens of the United States. As Lord Bryce so characteristically said of the relationship of our states and citizens:

> "The State, or a local authority constituted by State statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade * * * , marries him, divorces him, entertains civil actions against him, fines him for overspeeding his automobile, declares him bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools—all these derive their legal powers from his state alone * * * "[47]

So multifarious are these original and basic general laws administered by our states that if they were of recent origin we would probably think of them as the height of regimentation. Yet we accept these old laws venerably, and current ones being made by our state and local governments with indifferent questioning, because they were made, and are being made, by local lawmakers working in local atmosphere and solving local problems. In this way there has been delineated and circumscribed a field of government and law-

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such things as paving, lighting and cleansing of streets, protection of urban property against loss by fire, and protection of the health of urban population, although in recent years influenced by the federal spending power, are nevertheless from the standpoint of *policy* strictly municipal functions.

[46]*But see* Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923), in which a way was found for the federal government to entrench upon a state's jurisdiction over a question of domestic relations. Under implications of this decision, Congress might through legislation like the Maternity Act, occupy the whole field.

[47]1 BRYCE, THE AMERICAN COMMONWEALTH (1891) 425. But note the following language in the same paragraph: ". . . looking at this immense compass of state functions, Jefferson would seem to have been not far wrong when he said that the Federal government was nothing more than the American department of foreign affairs."

making for the states over which the federal government has never exercised any *constitutional* control.[48]

The department of adjective government, the administration of justice by the police, the courts, and now the more numerous administrative bureaus, where laws are executed and rights enforced, acts more directly upon the citizen than any other department of government. He feels the influence of government when he obeys the law without judicial compulsion. But it is when he violates the law, and his state or neighbor demands redress, or when he seeks the perquisites of the law, that he feels the restraining hand of government. Here it is the state rather than the federal government most generally functioning. In fact, he sees but little of federal courts or federal police. While he does see a great deal of federal bureaus, his primary accountability should be to his state and not to the federal government. State and local administration of justice inheres in the social objectives of democracy. Needless to say, the performance of this function can be for good or bad.[49] States can administer justice expediently and inexpensively or not. Although the functions of social organization may change rapidly, men's ideas of what is just change but little.

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[48]Notwithstanding there is no constitutional warrant for federal legislation in fields of general law reserved to the states, or in fact any federal attempt to dictate the common law of functions reserved to the states, the federal courts did actually assume jurisdiction over state common law from 1842, Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, to 1938, Erie v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 787. This preemption of jurisdiction by the federal courts laying down federal common law principles in the field of law merchant, was later extended to fellow-servant law, Baltimore & Ohio Railroad v. Baugh, 149 U. S. 368, 15 Sup. Ct. 914, 37 L. ed. 712 (1893), interstate commercial transactions generally, Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765 (1901), and to the standard of conduct involved in negligence cases, Southern Pacific Co. v. Berkshire, 254 U. S. 415, 41 Sup. Ct. 162, 65 L. ed. 335 (1921); Baltimore & Ohio Railroad v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24, 72 L. ed. 167 (1927). Although the rule was predicated upon the ideal of uniformity, a century of trial and expansion, first through the states' rights period and then through the period of nationalization, failed to realize the ideal. It was in diversity of citizenship cases, a small minority, that federal courts had opportunity to apply the rule; the very existence of the states kept all other cases out of federal courts. Significance goes with the fact that abandonment of the ideal and the application by federal courts of diverse common law of the states came at the time of federalization of state functions in the field of social welfare. See Fesler, *Federal Administrative Regions, with Special Reference to War Department Procurment Planning Activities* (Harvard University, 1935) 450. Although Congress has power to determine what law is applicable in federal courts, it seems improbable that the federal government will ever again occupy this field without constitutional change, since it is unaffected by social and economic crises.

[49]"Shall the young receive their political education at the party caucuses or at the town meeting?" Patten, *supra* note 9, at 38.

Optional Functions

The States and Functions of Economic Protectionism

To extend the police power of the states into the sphere of economic protectionism is a long jump from its fundamental use to govern men by providing protection against force and fraud. Such extension goes far into the optional field of government. It is a field although never effectively occupied by the states, now jealously eyed by them. Having seen their dogma of *laisser-faire* become the means by which the federal government has captured economic control of the citizen, and his fancy, in a day of economic change, the states must now occupy that field in proper perspective or abandon hope of ever occupying it more than nominally.

Not all the functions of economic protectionism can be performed by the federal government or under the coordinating hand of regional influence. Tending to the infinite, some problems are provincialized to states, and others are so localized that they affect only small economically-isolated groups of people. For them the state rather than the federal government is the more ideal *parens patriae*. In the solving of such problems the states can perform dual functions. They can fulfill their own needs. And at the same time without jeopardizing present expediency, they can act as experiment stations for the day when increased socialization of the nation will make those problems of national concern.[50]

The taxing power of the states, both for necessary and optional governmental functions, is still intact, and remains as originally restricted by the Constitution. They can still as always tax to regulate business[51] and to raise revenue for general welfare purposes.[52] But a difficulty now encountered is in the states taxing enormous amounts of wealth taken from the people by federal taxes and concentrated in federal government corporations or administrative agencies to be utilized in acomplishing economic reform. To such wealth the doctrine of legal incidence is applied, that without regard to its economic effect a state tax is valid only when Congress consents to its imposition.[53] Those instrumentalities enjoy the same immunity from state taxation as federal property and express federal prerogatives. While under the joint operation of the federal taxing and spending powers the poorer states benefit by the expenditure of money raised in the richer state, development of their resources through regional economic

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[50]See generally Woodrow Wilson, the State (1911).

[51]See United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936).

[52]*Ibid.*

[53]McCulloch v. Maryland, 4 Wheat. 316, 6 L. ed. 678 (1827); Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. ed. 204 (1824); Owensboro National Bank v. City of Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850 (1899); Davis v. Elmira Savings Bank, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. ed. 700 (1896).

unification would enhance wealth taxable for their own local welfare needs.

In the past state economic protectionism has been accomplished with gratifying results against nation-wide enterprises by means of regulatory laws administered by state railroad, industrial, public utility, insurance, banking and corporation commissions.[54] Although in performing their functions in a reasonable manner these bodies are not strictly accountable to the contract clause or to due process requirements,[55] they enjoy but little power over commerce. Being excluded from that field, the states should be invested with sufficient sovereignty to allow them either to exercise plenary power over their internal affairs without reference to effect upon interstate commerce, or in the absence of congressional action to exercise power over local matters that affect interstate commerce. A return to the doctrine of *Gibbons v. Ogden* wherein federal and state powers over interstate commerce are sharply defined with no concurrent field cannot be reconciled with any theory of compromising the claims of the respective sovereignties. The more feasible plan is to allow the states to say as a matter of sovereignty whether a field shall be occupied by the federal government or left to the states.[56] The plenary power of the states resulting from *Gibbons v. Ogden* implies that short of constitutional amendment state prerogatives cannot be surrendered even when the states so will. The other alternative is for the states to procure Congress to initiate federal action where Congress would otherwise be powerless. From an analogous standpoint the suggestion that state action should be used to check the federal government in its regulatory activities may contain a solution to the problem.[57]

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[54]See Hopkins Savings Association v. Cleary, 296 U. S. 315, 338, 56 Sup. Ct. 235, 241, 80 L. ed. 251, 259 (1935), (holding that a provision of the Federal Home Owners' Act permitting state building and loan associations to be converted into federal associations in contravention of the laws of the state of creation was invalid because it invaded the sovereignty of the state and impaired its public policy).

[55]Atlantic Coast Line Co. v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 52 L. ed. 721 (1914).

[56]". . . Again, if the necessity arises, the Federal Government must see that no private power is concentrated over the nation with which the states cannot properly cope, whether this concentration of power be by organized labor, monopolistic capital, or other group." Coolidge, *supra* note 40, at 92.

[57]See Collier, *supra* note 18, at 241: "If, therefore, it is thought consistent with constitutional principles to accord to the states large fields of tentative authority from which their control may be wholly displaced when Congress breaks its silence, why is it not equally consistent with the dignity and sovereignty of the nation to hold that when the nation goes beyond its express regulatory powers and touches, through its contractual or spending activities, some matters that are within the legislative authority of the state, its action is subject to state acquiescence and may be displaced, or, at least, may be checked for the future by adverse state regulatory action?"

STATE FUNCTIONS AND THE DEMAND FOR CONSTITUTIONAL CHANGE

The framers of the Constitution looked forward to future conventions to revise their work to meet new needs and to make such changes as were possible in the compromises they had accepted. On the other hand there were those who felt that the Constitution having been drafted as a stabilizing factor at a time of eceonomic emergency, when business was paralyzed, credit gone and anarchy rampant, and having served that purpose well, but little change would be necessary or feasible.[58] Accordingly the provisions for change by amendment were carefully devised for the dual purpose of making possible amendment for which there was sufficiently strong and enduring demand and at the same time to restrain from radical experimentation with the fundamentals of our system of government. The theory and prediction of the conservatives are confirmed by the fact that so few constitutional amendments have been adopted.

The permanency of the Constitution is due to the fact that it is capable of interpretative flexibility to meet changing conditions. The Supreme Court has recognized the need to construe the Constitution progressively and liberally. As Chief Justice Marshall said, the Constitution was

> "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been foreseen dimly, and can best be provided for as they occur."

Indeed the Court has acted in a qualified sense as a continuing constitutional convention.[59] Except for the Sixteenth Amendment making available to the federal government a generous source of revenue, it is largely through judicial construction that the scope of federal functions has been expanded at the expense of the states. The Court having broadened the scope of federal powers, the balancing of power between federal and state governments is no longer a judicial but a political question. That it is more difficult to change dual federalism by amendment than any other feature of our system of government is accepted.[60] The conditions which gave rise to judicial ex-

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[58]See generally BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1936 ed.).

[59]BECK, CONSTITUTION OF THE UNITED STATES (1936) 221.

[60]Hart, *A Unified Economy and States' Rights,* ANNALS, May, 1936; Elliott, *op. cit. supra* note 38, at 186.

pansion of the Constitution are no longer of emergency nature, but are now the permanent order.

The question then is whether the states can better be readapted to presents needs by judicial interpretation than by amendment. If the desired results can be obtained by interpretation, it is preferable to amendment. However, both methods are dependent upon future judicial decisions. Constitutional provisions sometimes lose much of their substance through judicial construction.

For Regional Problems

Before any fundamental constitutional changes are made, the states should exhaust the possibilities of interstate action as well as rejuvenation of their own independent powers. Why could not sufficient regional refunctionalization be accomplished without federal constitutional change?

1. The interstate compact clause should be liberalized so that states can solve regional problems without too much accountability to Congress. This liberal doctrine implies that states may enter into compacts about local matters without the consent of Congress.[61] Probably as suggested, the doctrine could find expression in judicial interpretation.

2. Congressional regulation of interregional commerce might be substituted for regulation of interstate commerce.[62] Unification of commerce should be regional rather than national in character. Under the doctrine of state power to govern local matters affecting interstate commerce when the exercise of federal power is dormant,[63] such modification could be made without constitutional amendment. Application of the doctrine to states acting in regional unison would not extend it far beyond the leniency of the states' rights period.

3. Groups of states with their own regional problems should be able to obtain administrative modification of conditions of federal grants to fit their own peculiar needs. This could well be accomplished by optional statutory clauses.

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[61]"There are many matters upon which different states may agree that can in no respect concern the United States." Virginia v. Tennessee, 148 U. S. 503, 517, 13 Sup. Ct. 728, 734, 37 L. ed. 537, 542 (1893). See Odum and Moore, *op. cit. supra* note 19, at 202.

[62]Munro, *supra* note 41. There is no requirement of uniformity under the commerce clause. Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 60 Sup. Ct. 907, 84 L. ed. 1263 (1940).

[63]Wilson v. The Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412 (1829). See Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases* (1914) 28 HARV. L. REV. 34, 43.

4. Groups of states can without federal consent agree on their own uniform laws. Where regional uniformity would have more utility than national uniformity, they should seek such agreement.[64]

5. Regional groupings of states may be made to affect individual state action on constitutional amendments.

For Local Needs

Federalism in its nineteenth century form will probably never be revived. Not one of the states standing alone possesses enough vitality to resist the inevitable march toward a measure of permanent federal centralization of economic affairs. But it is still possible to avoid the extreme of federalization. If they are to stand as more than boundaries for traditional loyalties, the states will have to revitalize their own local functions. For this no far-reaching constitutional changes should be necessary.

1. *The States Should Be Reorganized from Within*:

(1) To provide more efficient administration of justice.

(2) To strengthen the will to function more for local health, safety, morals and general welfare,[65] without sending their chambers of commerce to Washington to trade local autonomy for federal funds.[66]

(3) To perform their national election functions in such manner that local issues are not obscured by national issues.[67]

(4) To enact optional laws in the field of economic protectionism and allow diverse communities within a state to enjoy freedom of choice.[68]

(5) To exercise their power over the creation and dissolution of corporate entities to check corporate and monopolistic abuses over which, for want of effective action by the states, the federal government has assumed control.

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[64]Although the National Conference of Commissioners for Uniform State Laws has been in existence since 1889, no state has adopted more than twenty-seven of the proposed uniform state laws, and one state has adopted only two.

[65]That the states do have the power to legislate for what we now define as the general welfare was definitely affirmed in Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934) (upholding the right of the state under its police power to fix minimum and maximum retail milk prices).

[66]"If the members of a state have common interests and a common culture, with the unity of will which these give, almost any type of formal governmental organization will function efficiently. If the members lack this feeling of unity, no elaboration of formal governmental patterns or multiplication of laws will produce an efficient state or contented citizens." Linton, THE STUDY OF MAN 252.

[67]Patten, *supra* note 9, at 31.

[68]*Id.* at 32-33.

(6) To improve their political and administrative machinery to meet requirements in fields properly occupied by the federal government under grants-in-aid arrangements.

(7) To plan their individual destinies and coordinate their own resources, culture and personalities to that end.

2. If, however, amendment to reallocate powers between state and federal governments is the only solution, the principal powers delegated to each should be enumerated. State functions should be insured against encroachment even in the absence of state action. Particular emphasis should be placed upon the distinction between interstate and intrastate commerce, by circumscribing a field of intrastate commerce which the states may occupy in administering their own internal affairs, without too technical regard to legal or economic effect upon interstate commerce. Along with this, the taxing and spending powers of the federal government might be redefined to leave less room for judicial discretion.[69] Definition should be specific enough that there would be neither a "no man's land" nor a very broad field of concurrent jurisdiction. The alternative to the restriction of the spending power is the compulsory use of the states by the federal government as enforcement agencies, with acceptance of the obligations of enforcement optional with a state.

In the waging of the war the federal government has dedicated us to the greatest undertaking of all time. This is a field fundamentally belonging to the federal government. The states will not long remain jealous of any state power preempted for the more successful prosecution of the war. At the same time the federal government will be burdened to fulfill its manifold obligations in the field of economic control. No further expansion in this field seems feasible, except as temporary war measures. Instead many functions might well be surrendered back to the states now. Waging war to preserve the concept of democracy is one function of democracy. Preserving itself from its own self-exploitation is another function of democracy. In this way democracy will prove itself not only an ideal of Washington but an actuality at the crossroads.

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[69]This is not to curb *judicial review* as such, but to eliminate (1) Congressional discretion, and (2) the substitution of judicial discretion in cases involving the undefined spending power.

UNCONSTITUTIONAL LEGISLATION IN MISSISSIPPI*

Huey B. Howerton†

I. Constitutional Development

It will not be out of place first to reexamine the rules of construction which have been developed by the Court in its application of the principles of judicial review to unconstitutional legislation.[1] Their insertion ahead of a discussion of the cases should enable the reader to secure a better understanding of the problem involved, that is, the determining of the constitutionality of an act of a coordinate branch of government.

In the first case on record[2] involving an unconstitutional act of the Legislature, the Court stated that it was unwise and inexpedient to declare laws unconstitutional when there was any doubt in the matter. The people have set up a paramount rule; they have divided the government into three departments; and upon the Court devolves the high and important duty to prevent legislative violation thereof.

To determine between the Constitution and the Legislature always demands a cautious and deliberative investigation and is often embarrassing; but the Constitution must be preserved.[3] It is a delicate duty for the Court to declare an act unconstitutional, and the duty is especially painful when the act proceeds from a well-meant policy; but if the act is palpably unconstitutional, the question must be met with firmness. The Constitution is the paramount law—the supreme law—to which all others must yield. The Court cannot concern itself with consequences; the good or bad effects of a law in its practical operation can have no weight in deciding whether or not it be constitutional.[4] Since the Supreme Court is charged by the Constitution with the duty to sit in judgment upon the constitutional validity of the acts of the other departments of government, it is a solemn obligation which must be met.[5]

Very early the Court developed the doctrine of separability. Because one provision of an act is repugnant to a certain part of the Constitution, it does not necessarily follow that the other provisions, which are distinct and independent, are likewise invalid. The reverse, according

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†B.S. 1915, Miss. State; M.A. 1924, U. of Miss.; M.A. 1934, Ph.D. 1943, U. of Texas. Head of Department of Political Science, University of Mississippi.

[1]Perhaps the interest of the reader will be greater if it is kept in mind that these rules are taken from the decisions of the Court in the cases which are surveyed in this paper.

[2]Runnels v. State, Walk. 146 (Miss. 1823).

[3]Thompson v. Grand Gulf R. R. & Banking Co., 3 How. 240, 247 (Miss. 1839).

[4]Campbell v. Miss. Union Bank, 6 How. 625, 672 (Miss. 1842).

[5]Coffman v. Bank of Ky., 40 Miss. 29, 38 (1866).

to the settled rule of construction, is the case.[6] On the other hand, the Court has pointed out that when a particular clause of a statute is manifestly based upon certain other clauses which are pronounced unconstitutional it will fall with them, though not obnoxious itself to constitutional provisions.[7] Likewise, if the whole purpose of an act depends on one feature of the act and this feature conflicts with the Constitution, the whole act must fall.[8] A number of other cases might be cited in which the doctrine of separability is affirmed.[9]

There must not be such a thing as legislative omnipotence. It would be contrary to the spirit and policy of our institutions. Our government is founded on a written compact fixing the limits of each of the departments,[10] and the Legislature cannot exercise powers which in their nature are judicial.[11] If the Constitution were brought to the test of legislation, all restraint would be abrogated; and in cases in which there is a plain conflict between constitutional right and legislative power, indifference, hesitation, and timidity on the part of the judiciary would be considered conspiracy.[12]

In passing on an ordinance of the Constitutional Convention (1868), the Court pointed out that neither the Convention nor the Legislature could exercise judicial powers.[13] In this case there was involved the question of granting absolutely new trials.

In the same way that the Court has hesitated to declare an act of the Legislature unconstitutional if it could be avoided (and a reading of the decisions will impress one with the sincerity of the Court in this matter), it has likewise hesitated to overrule or dissent from a former judgment pronounced by it. Such a dissent is always embarrassing;[14] yet a reading of the decisions will convince one that the Court has not hesitated when necessary to overrule one of its own pronouncements.

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[6]Brown v. Beatty, 34 Miss. 227, 242 (1857). After some considerable time the Legislature began occasionally to insert a section to the effect that if any part of the act were held invalid the balance of the act would stand. Other than rendering the Court moral support, such a provision carries no weight; for after all it is left to the Court, independent of any legislative assertion, to decide whether what is left can stand alone. For such insertion see Laws of Miss. 1914, c. 112; State v. Rombach, 112 Miss. 737, 73 So. 731 (1916); and Laws of Miss. (1926) c. 131.

[7]Fant v. Gibbs, 54 Miss. 396, 411-12 (1877).

[8]Belzoni Drainage Com. v. Winn, 98 Miss. 359, 365, 53 So. 778, 779 (1910).

[9]Viator v. State Tax Comm., 5 So. (2d) 487 (Miss. 1942); Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934); Trahan v. State Highway Com., 169 Miss. 732, 151 So. 178 (1933); Hudson v. Stuart, 166 Miss. 339, 145 So. 611 (1932); Runnels v. State, 154 Miss. 621, 122 So. 769 (1929); State v. Speakes, 144 Miss. 125, 109 So. 129 (1926); Hatten v. Bond, 112 Miss. 590, 73 So. 612 (1916); Board of Sup'rs of Holmes County v. Black Creek Drainage Dist., 99 Miss. 730, 744, 55 So. 963, 964 (1911); State v. Jackson Cotton Oil Co., 95 Miss. 6, 48 So. 300, 301 (1909).

[10]Isom v. Miss. Central R. R., 36 Miss. 300, 310 (1858).

[11]*Id.* at 314.

[12]Griffin v. Mixon, 38 Miss. 424, 450 (1860).

[13]Lawson v. Jeffries, 47 Miss. 686, 694 (1873).

[14]Lessley v. Phipps, 49 Miss. 790, 805 (1874).

In establishing the rule of judicial construction of constitutional provisions with reference to alleged conflicts of statutes, the Court cites Cooley[15] with approval. In case of doubt every possible presumption will be in favor of the constitutionality of the act; for a conflict between the statute and the Constitution is not to be implied. It would seem to follow that when the meaning of the Constitution is clear, the Court, if possible, must give to a statute such construction as will enable it to have effect. Whenever possible, such construction will be adopted by the courts.[16] The presumption is always in favor of the constitutionality of acts of the Legislature. It is only when they manifestly infringe some of the provisions of the Constitution or violate the rights of the citizens that the judicial power will act to declare them null and void.[17] Nor has the Court any power to examine an act of the Legislature generally and declare it unconstitutional. A suitor must show conclusively not only that the act about to be performed is unconstitutional but that it will inflict a direct injury upon him.[18]

In the protection of property rights, the citizens hold by the higher tenure of the Constitution with the judiciary it creates as its guardian;[19] and the people have declared to which body of men they are willing to give the power of saying what shall be the laws of the State.[20]

Just as the Court cannot concern itself with consequences,[21] nor take into consideration the practical operation of a law in deciding its constitutionality,[22] neither can the reasonableness and excellence of a provision be the test. Expediency must not be the rule by which to interpret the Constitution.[23] To the Court belongs the high and necessary duty to determine the constitutionality of an act of the Legislature when such question is properly presented to it for determination, and the duty cannot be avoided because of the results.[24]

An interesting constitutional rule for the guidance of the Court in passing on the constitutionality of acts of the Legislature is found in the present Constitution.[25] If certain procedural requirements are met, the Court shall not, because of the local, special, or private nature of the act, refuse to enforce it. This rule is not applicable, however, to the

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[15]Cooley, Constitutional Limitations (1871) § 184.
[16]Burnham v. Summer, 50 Miss. 517, 520 (1874).
[17]*Id.* at 521.
[18]Gibbs v. Green, 54 Miss. 592, 612 (1877). This is to say that an act may be unconstitutional as to one party but not to another.
[19]Board of Sup'rs of Warren County v. Cowan & McCabe, 60 Miss. 876, 885 (1883).
[20]Montross v. State, 61 Miss. 429, 433 (1833).
[21]See p. 88 *supra.*
[22]*Ibid.*
[23]Wynn v. State, 67 Miss. 312, 321 (1899).
[24]Yazoo & M. V. R. R. v. Adams, Rev. Agt., 81 Miss. 90, 120, 32 So. 937, 946 (1902).
[25]Miss. Const. (1890) § 89.

specific prohibitions on special legislation,[26] nor to an act to suspend the operation of a general law.[27]

It would seem that the Court, being human and endowed with all the emotions of mankind, would have to struggle against the apparent temptation to be swayed in upholding an unconstitutional statute because of its worthy aims. Rather pointedly and with considerable finality, it seems, the Court makes the following statement: "The provisions of the act are humane and praiseworthy, but with this we have no concern when engaged in determining its validity."[28] The Constitution must be obeyed even though neighbors and friends are discommoded.[29]

The comment has been made that the Court finds it embarrassing to overrule one of its decisions.[30] The Justices tempered this embarrassment with a degree of levity on one occasion. The Court had under consideration a change of decisions interpreting criminal statutes and made this statement:[31]

> "It is also said that every man is presumed to know the law, and no one can take shelter under an erroneous decision of the highest court. This argument is in our opinion manifestly faulty. If the legal maxim has any application to a case like this, and is controlling, the maxim must be amended to read thus: 'Ignorance of the law excuses no man except members of the supreme judicial tribunal of the state.'"

As to the status of an unconstitutional law, the Court has made it very plain that such an act was absolutely void. It was, in effect, a mere waste of paper, and no rights could accrue under it.[32] Another maxim of construction to which the Court adheres is *expressio unius est exclusio alterius,* "the expression of one thing is the exclusion of another."[33] Recently the Court has had to reiterate the principle that a statute will not be held unconstitutional unless there is no other reasonable escape therefrom. Every reasonable doubt should be resolved in favor of constitutionality.[34] The decisions of the Court on this point are numerous.[35]

Summary. Liberalism crossed the Atlantic, tarried awhile on the coastal area, and then moved west, accompanied and supported by con-

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[26]*Id.* § 90.
[27]Yazoo & M. V. R. R. v. Southern Ry., 83 Miss. 746, 773, 36 So. 74, 78 (1903).
[28]State v. Kirby, 96 Miss. 629, 631, 51 So. 811, 812 (1910).
[29]Hewes v. Langford, 105 Miss. 375, 389, 62 So. 358, 360 (1913).
[30]See p. 88 *supra.*
[31]State v. Longino, 109 Miss. 125, 135, 67 So. 902, 904 (1915).
[32]Pearl River County v. Lacey Lumber Co., 124 Miss. 108, 86 So. 757 (1920).
[33]Smith v. Chickasaw County, 156 Miss. 171, 181, 125 So. 96, 98 (1929).
[34]Tucker Printing Co. v. Board of Sup'rs of Attala County, 171 Miss. 608, 617, 158 So. 336, 338 (1934).
[35]*Ibid.; cf.* Miss.-Southern Digest *Constitutional Law.* § 48.

servatism. Although not always hand in hand, the two ideas have, in the main, gone side by side. The one promotes; the other gives stability.

It is in this conception and from this development that the Constitutions of the State have sprung. And the history of the movement is embedded in the past and based on written rules of government. The early settlers of what now constitutes the State came west from a section already under written law, colonies governed under charters granted by the Crown of England. Although granted, the charters were an acknowledgement of certain rights belonging to and inherent in the people. Throughout the governmental history of Mississippi, from the Charter of South Carolina through the Constitution of Georgia and the Territorial Government under the control of Congress to the adoption of the Constitution, there is revealed the conflict of liberalism as represented by popular sovereignty, limited government, and personal rights on the one hand, and of conservatism as represented by central control, granted rules, and property rights on the other hand.

The ability to govern has been consistently associated with the idea of acquisition of property. This is the notion of stability, an underlying quality that all governments must have. Those who do not own property, as the idea developed in practice, were not capable of governing or selecting those who governed. Our constitutional history, with the exception of two periods, has emphasized the close connection between property and officeholding and voting. The two periods in which this was not true were (1) the one in which the influences of the frontier were evidenced in the Constitution of 1832; and (2) the one in which the influences of theoretical democracy and practical politics enfranchised a previously politically submerged class, manifest in the Constitution of 1869.

These same applications of liberalism and conservatism were manifested within the periods mentioned in reference to the method of selection and by powers of the respective departments of government. The coming of democracy gave us the long ballot and disintegration, with a resulting lessening of the powers of the Governor. This democracy gave us an elective judiciary from 1832 to 1869 also; but apparently the courts were not less interested in upholding the supremacy of law because of such method of selection. It was not until after the turn of the twentieth century (1914-1916) that the judiciary again became elective.

Judicial review of legislation has run throughout the entire period. From the time that the judges were appointed under the Charter of the Carolinas when all laws should be consonant with reason and agreeable to the laws of England, up to the present time, this principle has apparently had a much easier road to travel than some other principles embedded in constitutional development. It is of note that the greatest friction which developed concerning judicial review was under what might be termed a conservative Constitution (that of 1817), to which

detailed reference will be made in an analysis of the cases dealing with the Bill of Rights. This friction, it is true, was a result of a liberalizing force on the law-making body; and this is not to say that judicial review has always been conservative.

In our constitutional development, the Court has been adhering to certain fundamental rules of construction which are applicable in passing on the constitutionality of an act of the Legislature. It is in the application of these rules that it has shown its greatest wisdom. The Court has patiently and consistently upheld the fact of a written, fundamental, superior law to which all agencies and all people must adhere. At the same time, it has been unwilling to set its judgment arbitrarily against that of the representative body. In case of doubt, the dissolution has been in favor of the constitutionality of the act; but when no doubt existed in the mind of the Court, it has not hesitated to declare laws unconstitutional. Regardless of consequences, the Constitution must be preserved. And although there may be those who doubt the efficacy of judicial review, none, it is thought, will disagree with the premise on which such a principle is predicated.

II. The Bill of Rights[36]

In view of the importance of the Bill of Rights as it has contributed to the total number of cases involving unconstitutional legislation, it is believed that a brief analysis and comparison of the provisions of the four Constitutions of Mississippi are in order. The section numbers indicate the location of the subject matter; the "x" indicates the elimination of it.

1817	1832	1869	1890	1817	1832	1869	1890
1	1	x	x	20	19	x	x
2	2	x	5, 6	x	20	17	x
3	3	23	18	x	20	18	x
4	4	23	18	21	21	x	x
5	5	x	x	22	22	6	11
6	6	x	x	23	23	15	12
7	7	4	13	24	24	25	9
8	8	4	13	25	25	x	x
9	9	14	23	26	26	x	x
10	10	7	26	27	27	x	x
10	10	2	14	28	28	12	31
11	11	x	x	29	29	30	25
12	12	31	27	x	30	29	20
13	13	5	22	x	x	1	8
13	13	10	17	x	x	13	x

[36]For copies of the Constitutions of the State, see Ethridge, Mississippi Constitutions and the Miss. Codes. Greek Rice, Attorney General, has issued a copy of the Constitution of 1890 annotated to July 1, 1942.

1817	1832	1869	1890	1817	1832	1869	1890
14	14	28	24	x	x	16	x
15	15	x	x	x	x	19	15
16	16	8	28	x	x	20	7
16	16	8	29	x	x	21	x
17	17	8	29	x	x	22	x
17	17	3	21	x	x	24	x
18	18	11	30	x	x	26	10
19	19	9	16	x	x	27	19
				Con.	Con.	32	32

It is noted that the Bill of Rights of the Constitution of 1817 is identical with that of 1832 except for sections 19, 20, and 30. Sections 19 and 20 (1817) are combined into section 19 (1832). Sections 20 and 30 are added in 1832. The Bill of Rights of 1869 eliminates eleven sections of 1832 and adds ten; the Bill of Rights of 1890 eliminates seven sections of 1869 and adds two.

A. *Obligation of Contracts; Ex Post Facto Laws.*

The respective constitutional sections, each incorporating these two rights, are as follows:

That no ex post facto law, nor law impairing the obligation of a contract, shall be made.[37]

No conviction for an offence shall work corruption of blood or forfeiture of estate. The legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts.[38]

No ex post facto law, or law impairing the obligation of contracts, shall ever be passed.[39]

Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.[40]

In a consideration of unconstitutional legislation under the Bill of Rights, it is found that more cases are based on the provision concerning the obligation of contracts than on any other.[41]

The first case under these guarantees, when legislation was invalidated for the second time in the life of the Court,[42] was a case which cre-

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[37]Miss. Const. (1817) Art. I, § 19.
[38]Miss. Const. (1832) Art. I, § 19.
[39]Miss. Const. (1869) Art. I, § 9.
[40]Miss. Const. (1890) Art. III, § 16.
[41]Of a total of 168 cases considered specifically for the survey of this subject, some 63 involved the Bill of Rights; and of this number, 21 cases deal with the contract clause and two with ex post facto laws.
[42]For the first case, see *supra* note 2. These are the only two cases invalidating legislation under the Constitution of 1817.

ated a great deal of friction, so much friction, in fact, that the case is not officially reported.[43] It dealt with impairing the obligation of contracts and the style is: *Cochrane and Murdock v. Kitchens, et al.,* Supreme Court, June Term, 1824.[44] Briefly stated, the facts were: Kitchens gave Cochrane and Murdock a promissory note for $81.47 bearing interest from January 1, 1821, which he failed to pay. The Circuit Court of Claiborne County, at the April, 1822, term entered judgment for the plaintiffs with execution of said judgment returnable at the October term, 1822. The Sheriff took a bond with two parties (Armstrong and Dorsey) as security for Kitchens. A mortgage on some personal property was also given. The action on the part of the Sheriff was reported to the Court at the October term. On the non-delivery of the property, however, the bond was forfeited, judgment operated against said Armstrong and Dorsey, and execution issued from the Clerk's office in February, 1824, returnable the third Monday in March following (in the Circuit Court). No further postponement was allowed.

In the meantime the Legislature had passed an act "further to extend relief to debtors"[45] which made it the duty of the Sheriff to sell property taken for debt on one year's credit in case such property when offered for sale did not bring two-thirds of the approved value.

The Sheriff acting under this statute, sold the property and extended credit for one year. At the March, 1824, term of the Circuit Court the attorney for the plaintiffs (Cochrane and Murdock) moved the Court to enter a fine of $100.00 against the Sheriff for making a false return on the above-mentioned bond.

The point made before the Circuit Court and reserved for the consideration of the Supreme Court was whether the act impaired the obligation of contracts.[46] The Supreme Court held the act unconstitutional and sustained the motion to fine the Sheriff.[47] The Court held that the original contract was impaired by the act which authorized the Sheriff to take different security and postpone the payment of the debt for one year, when the original parties (creditors) were not now parties to the altered contract.

The Legislature met January 3, 1825, and the fireworks began! On the first day of the Session of the House a Mr. Haile submitted for con-

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[43]In an effort to locate the decision of the Court in the case, conferences were had with the officials of the offices of the Attorney General, the Secretary of State, the Supreme Court Clerk, the State Library, and the Department of Archives and History. The search was unavailing.

[44]House Journal, 8 Sess. 1825, 68. Particular attention is called to the report of the committee appointed to investigate the matter, found under date of January 11, 1825, pp. 68-77.

[45]Miss. Laws (Pray 1824-1838) §§ 1-13, 49 *et seq.,* approved January 23, 1824.

[46]Miss. Const. (1817) Art. I, § 19.

[47]Miss. Rev. Code (Poindexter 1824) c. 44, § 7, p. 251.

sideration a resolution, the gist of which was that the legislature should be made acquainted with the opinions of the Court, particularly when such opinions affected important rights and involved the constitutionality of important laws; and that the Judges of the Supreme Court which was then in session, should be requested to forward to the House immediately their opinions *seriatim* upon the constitutionality of the act for the relief of the debtors.

On the same day a Mr. Williams offered the following resolution:

> "Resolved, by the Senate and the House of Representatives of the State of Mississippi in General Assembly convened, That the Sergeant-at-Arms be commanded forthwith to *order* the Judges of the Supreme Court to appear at the Bar of this House, and show cause, why they should not be removed from office, in consequence of their decision in relation to the act extending further Relief to Debtors."[48]

On the same day also (January 3) "Mr. Williams gave notice that he shall on Wednesday next, ask leave to introduce a Bill to repeal the fourth, seventh and eighth sections of an act, entitled 'An Act, further to extend relief to Debtors,' approved January 25, 1824."

The following day Mr. Haile introduced a bill relative to the Supreme Court.

Now we shall trace the happenings concerning the Williams resolution which ordered the Judges to appear before the Bar of the House, and leave the Haile resolution and bill and the Williams bill for later consideration.

On January 4 the House voted at Williams' request to strike out the word "order" and insert the word "notify." And by a vote of 29 to 5[49] a select committee of seven members was appointed "to call for persons and papers." This Committee made a report to the House on January 11 as follows:

Judge Richard Stockton, Jr., was called before the committee and after giving the facts in the case and the action of the Circuit and Supreme Courts, made a full statement, which was incorporated in the Committee Report to the House. In support of the position of the Court in sustaining the motion to fine the Sheriff and in declaring the Act unconstitutional, Stockton cited the provisions of the Federal and State Constitutions in regard to impairing the obligation of contracts.[50] In addition, he indicated the position taken by the United States Supreme Court in

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[48]House Journal, 8 Sess. 6-288.
[49]The membership of the House was thirty-five; of the Senate, ten.
[50]U. S. Const. Art. 1, § 10; Miss. Const. (1817) Art. I, § 19.

two cases in point,[51] brought out the fact that North Carolina had passed an act similar to the "stay" law of Mississippi which was declared unconstitutional, and further pointed out (without referring to the cases) that laws similar in principle had been declared unconstitutional in five other states as well as in several of the Circuit Courts of the United States.[52]

The Committee then reviewed for the benefit of the House the facts in the case and concluded its Report as follows:

> "The Committee, on review of the case, and the proceedings of the Sup. Court, do believe that the opinion of the Court as to the constitutionality of that Section of the Law, was erroneous; and, as respects the fine imposed upon the Sheriff the committee do not hesitate to say it was unjust and illegal; for they cannot believe that any subordinate officer ought to be punished for executing any process which emanates from any competent authority; *it is his duty to execute it, and not to judge of its legality.* And the committee know of no power, either delegated or implied from the constitution, that authorizes the Supreme Court to make such a declaration of the unconstitutionality of any law to suspend its operations, but must believe such power assumed and maintained on the grounds of Judiciary precedents alone.
>
> The committee hold it to be of the greatest importance that the several departments of Govt. should be separate and distinct; and that they should at the same time harmoniously cooperate in the great object of our policy—the common good—and they hope that they, into whose hands are committed such important trusts, will exercise them with caution, so as to avoid collision or confliction, unless impelled by the most imperious necessity.
>
> The Committee cannot entertain an idea that the Sup. Court was influenced in their decision by an impure motive; and trust that the Legislature will determine with such firmness as shall

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[51]Sturges v. Crowningshield, 4 Wheat. 122 (U. S. 1819); Green v. Biddle, 8 Wheat. 1 (U. S. 1823).

[52]The Committee asked Judge Stockton the following questions:

1. Was it the opinion of the Supreme Court, that any officer, executive or ministerial, can be punished for executing a law before the same has been declared unconstitutional by the Court?
2. Was it the opinion of the Supreme Court that the Court had a right to make such a declaration of the unconstitutionality of a law as to suspend its operation, and would the Court have justified any ministerial officer for refusing to execute the said law after such declaration?
3. Was it the opinion of the Supreme Court that the whole of the seventh section (under which the sheriff acted in extending one year's credit) of the act was unconstitutional, or if only a part of the section, what part?
4. Was it the opinion of the Supreme Court that the whole of the seventh section was unconstitutional as to all contracts, or to such only as had been entered into previous to the passage of the law?
5. Was it the opinion of the Supreme Court that the court had power and right to declare an act of the Legislature unconstitutional; if so from whence does the

secure the rights and interests of the community; and at the same time, with that justice, liberality, and respect which is due to them to whom is committed the administration of the Laws."[53]

An amendment was offered to the report of the Committee by its Chairman, Mr. Johnson, which differed in phraseology but not in substance.[54]

The amendment sought a written report of the Judges, individually, on the constitutionality of the Act. The Attorney General also was requested to communicate his opinion. The resolution requiring the Judges to appear at the bar of the House was to be postponed indefinitely, if the amendment were adopted. The amendment, together with the Committee Report, was ordered to lie on the table.

On January 14, the Committee Report was called up and a motion made to postpone indefinitely, which lost by a vote of nine to twenty-six.[55] Consideration was postponed, however, until "Tuesday next." Again it was ordered to lie on the table.[56] The next day (Jan. 22) the House considered the report in committee of the whole. Later the House ordered the Committee (investigating the matter) to continue its consideration.[57] This seems to have been the end of the matter, officially, for nothing else appears in the Journal relative to it.

We revert now to a consideration of the other matters before the House which appear to have been inspired as a result of the decision of the Murdock case. These matters were:

Court derive its power; was it expressly delegated or implied, or was it from common usage?

Judge Stockton addressed the following reply to the Chairman of the Committee:

As to the first of the inquiries: The question before the Supreme Court was whether the sheriff should be finded one hundred dollars according to the statutes, for failing to make a due return upon the execution and for having made a false return thereon; the motion to fine the sheriff was in strict conformity with the statutes, and the Committee have already the opinion of the Court in writing.

Upon the second inquiry: The question was not made before the Supreme Court.

Upon the third and fourth inquires: The opinion of the Supreme Court which is in possession of the Committee was that it was unconstitutional as to all contracts previous to the passage of the law. The Court was not called upon to give any abstract opinion upon any question not immediately before them; but if the Committee are desirous of ascertaining what my private opinion is (and I was at that time the junior member of the Bench) I will give it with great cheerfulness, and assure them that the other members of the Bench join me in the opinion, although from the case before them not requiring it, no official promulgation was made.

As to the last inquiry: The question is an abstract one and was not agitated; unless the Committee consider the principle to be embraced in the opinion of Cochrane & Murdock against Kitchens and others, all which is most respectfully submitted Richard Stockton, Jr., January 7, 1825.

[53]House Journal, *op. cit.*, 74.

[54]House Journal, *op. cit.*, 75.

[55]House Journal, *op. cit.*, 101.

[56]*Id.* at 142.

[57]*Id.* at 146.

1. The resolution by Haile presented on the first day (January 3) requesting the Judges to forward to the House immediately their opinions upon the constitutionality of the act "for the relief of debtors."

2. The notice by Williams that he would introduce a bill to repeal parts of the act extending relief to debtors.

3. The introduction by Haile of a bill "relative to the Supreme Court."

The Haile Resolution. On January 3, the date of presentation, it was ordered to lie on the table. Apparently it remained on the table, for there is no further record of its consideration. It was superseded by the work of the select Committee of seven and the Haile bill relative to the Supreme Court.

The bill repealing parts of the Act. This Act has previously been referred to. Mr. Williams desired to repeal the fourth, seventh and eighth sections and introduced a bill to this effect on January 5.[58] On February 4, the House received notice from the Governor that he had signed the bill "yesterday." The passage of this repealing bill thus closed another chapter in the struggle for supremacy.

The bill relative to the Supreme Court. It will be recalled that Haile introduced in the House a bill on January 4, "relative to the Supreme Court." With amendments, the bill was passed by the House and Sen-

[58]The provisions of the act sought to be repealed are:

Sec. 4. And be it further enacted, That the prison bounds of each county within this state, shall be extended to the entire limits thereof; and any person imprisoned for debt, shall hereafter only be bound to give bond and security, to keep within the limits of the county within which he may reside, at the time of his imprisonment.

Sec. 7. And be it further enacted, That when any writ of fieri facias shall be levied on any lands and tenements, or any other property, when a capias ad satisfaciendum, lands tenements or other property shall be surrendered to the sheriff or other officer, in discharge of the debtor, it shall be the duty of such sheriff, or other officer forthwith to summon three respectable disinterested freeholders of his county, who shall on oath to be administered to them by the sheriff or other officer, view the lands and tenements or other property so levied on or surrendered as aforesaid, and certify under their hands and seals the fair value thereof in ready money; and if on the day appointed for the sale thereof the same will not sell for two-thirds of the said valuation, as certified by said freeholders, the sheriff or other officer shall sell the same to the highest bidder on a credit of twelve months, (this is the creed of the whole matter), taking bond with good and sufficient security of the purchasers, payable to the plaintiff, or plaintiffs, inclusive of principal, interest, and costs expressed in the execution, with interest to the time when said bond shall be payable; if the same shall sell for so much, and the bond so taken shall be returned by the sheriff, or other officer, to the office of the court from which the execution issued, and shall have the force and effect of a judgment; and if the obligators of such bond fail to pay the amount thereof, at the time fixed for the payment, the plaintiff or plaintiffs may sue for the execution thereon, against the said obligees for the amount due, and the clerk shall endorse on such execution, that no valuation or appraisement is to be made of property, real or personal levied on by virtue of such execution and such property, real or personal, as may be levied on or surrendered to satisfy such execution, shall be sold by the sheriff or other officer, to the highest bidder for cash.

Sec. 8. And be it further enacted, That if any bond, taken under the preceding

ate, and the Governor signed the bill on the evening of February 4, 1825. The law as passed follows:[59]

> "An Act, relative to the Supreme Court, and to prescribe the duties of the Judges therein.
>
> Sec. 1. *Be it enacted by the Senate and House of Representatives of the State of Mississippi, in General Assembly convened,* That the judges of the supreme court, at each term of the said court, shall appoint one of their number, to deliver the opinion of the supreme court in writing, upon any suit, controversy, matter or thing, whatsoever, which may be brought in or presented for adjudication in said court. And it shall be the duty of the judges of the said court, to cause said opinions so written and delivered, to be filed by the clerk of the supreme court, with the papers of every suit, matter or thing, which said opinions may have relation to.
>
> Sec. 2. *And be it further enacted,* That it shall be the duty of the clerk of the supreme court, to furnish any person on application, with a copy of said opinions, and the clerk shall be entitled to demand and receive for each copy, fifteen cents for every hundred words, contained in said copy. And that the judges of this state, when in the supreme or circuit courts, where they shall make any decision affecting the constitutionality of any law passed by the legislature, shall make out a full report of the case and decision thereon, and sign the same, and within twenty days thereafter, transmit a copy thereof, to the governor of this state, who shall immediately have the same published in some public newspaper, printed within the state, for the information of the citizens thereof, and the governor is hereby authorized to pay for the printing thereof out of the contingent fund. Approved, February 4, 1825."

The two Houses adjourned *sine die* the evening of Friday, February 4, 1825.

Following the friction developed as a result of the *Kitchens* case before the Court and the Legislature in 1825, it was not until 1846 apparently that the Court found it necessary to express serious doubts concerning a provision of a statute said to be in conflict with the provision of the Constitution[60] dealing with impairing the obligation of a contract. A provision of a law[61] stated that when banks had forfeited their charters, an injunction could be issued against them restraining them from the collec-

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section of this act, shall be at any time quashed, as faulty, the obligee or obligees, in such bond, besides his, her, or their remedy against the sheriff, or other officer, may have execution on the judgment, as if no such bond had ever been taken. Miss. Laws (Pray 1824-38) §§ 50, 51.

[59]Miss. Laws (Pray 1824-1838) § 85.

[60]Miss Const. (1832) Art. I, § 19.

[61]Miss. Laws 1843, c. 3, § 6, pp. 54-55; Miss. Code (1798-1848), c. 15, § 6.

tion of their debts. In a previous case[62] by a divided Court[63] this provision was upheld. The case attracted a great deal of attention. Thus the case that came up to the Court in 1846 was exhaustively argued with a great number of authorities cited. Chancellor Kent was counsel for the trustees who had been appointed under other provisions of the act. In deciding the question again,[64] by a divided Court, the Judges held the provision to be invalid if considered alone but valid if considered with other provisions of the act.

Banking legislation was involved also in the next case. Apparently as a result of the decision in the previous case the Legislature passed an act in 1846[65] which provided that the trustees as provided under an act of 1843 should take an inventory and sell under court order for cash to the highest bidder all property and evidences of debt of the bank, and distribute the proceeds. The Court held the act unconstitutional.[66] The creditors had acquired vested rights which were swept away. A forced sale for cash at auction of a debt is not a legal remedy and a destruction of the remedy is a destruction of the right.

Is a legislative grant to a municipality a right which cannot be impaired by subsequent legislation? The Court answered this question in the affirmative.[67] By a prior act (1837) a town had been granted the sole power to issue licenses to sell liquors, the revenue therefrom to be used by the town. The act under review[68] changed this grant and directed the money to be applied to an academy. The Court held that the city had a vested interest in the profits. The Legislature might take away the franchise altogether, but while it remained, the city was entitled to the advantages granted. The Court cited the rule laid down by Kent that "grants of property and of franchises coupled with interest, to public or political corporations are beyond legislative control, equally as in the case of the property of private corporations."[69] "The government cannot recall its own endowment granted to any hospital, or college, or city or town, for the use of such corporations."[70] This case however was later overruled.[71]

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[62]Commercial Bank of Rodney v. State, 4 S. & M. 439 (Miss. 1845).
[63]Chief Justice Sharkey dissented.
[64]Nevitt v. Bank of Port Gibson, 6 S. & M. 513 (Miss. 1846).
[65]Miss. Laws 1846, c. 9, §§ 3-7, pp. 118-121.
[66]Commercial Bank of Natches v. Chambers, 8 S. & M. 9 (Miss. 1847).
[67]Trustees of Aberdeen Female Academy v. Mayor and Aldermen of Aberdeen, 13 S. & M. 645 (Miss. 1850).
[68]Miss. Laws 1848, c. 255, §§ 1-3, p. 477.
[69]Trustees v. Mayor, *et. al.*, 13 S. & M. 645 (Miss. 1850), n. 67, *supra.*
[70]*Id.* at 647, citing Story in Dartmouth College v. Woodward, 4 Wheat. 699 (U. S. 1819).
[71]Board v. Aberdeen, 56 Miss. 518 (1879).

It was ruled that the Legislature could not provide for the suspension of all laws for the collection of debts.[72] The acts involved[73] sought to do this. The parties to a contract must have a right at all times to some adequate remedy, some available remedy. Interposing a positive interdict against the institution of suits on contracts violates the obligation thereof. The Court had not heard of the decisions in the Minnesota Moratorium Law case!

If a farmer gave a lien on his crop (acting under a provision of a law),[74] the Legislature could not at a later date alter[75] the law so as to interfere with contracts already made. To do so would impair the obligation thereof.[76]

The State created a levee board with authority to issue bonds.[77] Later an act was passed[78] by which a tax was levied on the land to continue until all liabilities were paid up. Within a few years' time the Legislature repealed the land tax. Provision was made for the bond-holders to surrender them to an Auditor and Treasurer and receive in lieu thereof new bonds of one-third the amount due on those surrendered; a new taxing scheme was adopted and all those who failed to surrender their old bonds were denied all participation in the new tax.[79]

The Court held this repealing act to be a flagrant violation of the vested rights of the bond-holders.[80] The interesting point about the case, however, is that the Court denied the complainant the petition he sought.

> "We cannot see that any duties devolved by the act upon the auditor and treasurer, the performance of which we are asked by the bill to enjoin, are so harmful to the complainant that he is entitled to arrest their execution . . . These officials have nothing whatever to do with the imposition of collection of the new tax or the abolition of the old one . . . It may be that a madamus would lie against the sheriff . . ."[81]

Neither an executive nor a ministerial officer could be enjoined generally from putting a law in force.[82] One seeking an injunction should be able to specify some particular act, the performance of which will harm him, and this act alone can be restrained.

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[72]Coffman v. Bank of Ky., 40 Miss. 29 (1866).
[73]August 1861 and December 1865.
[74]Miss. Laws 1866-67, p. 369, c. 465, §§ 1-8.
[75]Miss. Laws 1872, p. 131, c. 107, §§ 1-14.
[76]Leak v. Cook, 52 Miss. 709 (1875).
[77]Miss. Laws 1858, c. 1, p. 39.
[78]Miss. Laws 1866-67, c. 173, p. 237.
[79]Miss. Laws 1877, c. 5, p. 23.
[80]Gibbs v. Green, 54 Miss. 592 (1877).
[81]*Id.* at 611.
[82]*Ibid.*, citing Mississippi v. Johnson, 4 Wall. 475 (U. S. 1866).

In discussing the constitutionality of an exemption act,[83] the Court pointed out that there was nothing in the act to indicate whether it was to be retrospective or prospective only; but conceding that is was intended to apply to debts previously contracted, in was unconstitutional. The confusion had arisen because of the difficulty of distinguishing between the right and the remedy. The right must not be impaired but the remedy might be modified.[84] This was emphasized further when the Court was compelled to invalidate an act[85] which sought to require the holders of county bonds to register them and show, among other things, the names of the different persons through whom the holder derived title. This went beyond remedial legislation and varied the contract. To require a holder of a bond more than ten years after its issuance, to name the different persons through whom title had passed and on failure to do so, to forfeit payment, imposed burdens on the contract obnoxious to the mandate of the Constitution.[86]

The ex post facto provision is in the same section as that pertaining to the obligation of contract. The Constitution of 1832, only, added a bill of attainder. It is quite singular that only two cases involved ex post facto legislation,—when this provision was placed in the Constitution of 1817 and is found in the present one.

The first case involving an ex post facto law had to do with carrying concealed weapons. Following an indictment under an act,[87] the Legislature prior to conviction altered a provision of the act under which the indictment was brought, the alteration being against the individual.[88] In disposing of the case[89] and invalidating the act, the Court pointed out that no provision of our State or Federal Constitutions is founded on broader or more just views of human rights and liberties. The Court cited a number of authorities.[90] Not until 1924[91] was another act passed which, if interpreted by the Court so as to apply to a prior indictment, would have been unconstitutional.[92]

Rather extensive litigation was involved in a case deciding the invalidity of three acts. The Legislature had authorized setting aside a certain per centum of a tax to be used to retire the bonds of a levee district.[93]

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[83]Miss. Laws 1875, c. 96, p. 122.

[84]Johnson v. Fletcher, 54 Miss. 628, 631 (1877). For discussion of modification of remedy, see Coffman v. Bank of Ky., 40 Miss. 29 (1866). See also Lessley v. Phipps, 49 Miss. 790 (1874); Sturges v. Crowningshield, 4 Wheat. 122, 198 (U. S. 1819).

[85]Miss. Laws 1884, c. 321, p. 321.

[86]Priestly v. Watkins, 62 Miss. 798, 806 (1885).

[87]Miss. Code (1880) § 2985.

[88]Miss. Laws 1888, c. 54, p. 89.

[89]Lindzey v. State, 65 Miss. 542, 5 So. 99 (1888).

[90]*Ibid.* Authorities include Madison, Hamilton and Calder v. Bull, 3 Dall. 386 (U. S. 1798).

[91]Miss. Laws 1924, c. 245, p. 344.

[92]State v. Clark, 145 Miss. 207, 110 So. 447 (1926).

[93]Miss. Laws 1871, c. 1, p. 45.

Under the provisions of this act, the Court said[94] that the bondholders acquired such a contractual right that the following statutes, as applied to them, were unconstitutional in impairing the obligation of a contract: an act which sought to abate taxes legally due the levee board;[95] an act which sought to avoid legally due taxes, or to release lands therefrom;[96] and an act which related to the lands held by the purchaser through quit-claims by the State, insofar as it affects the rights of bond-holders.[97] Additional cases in point are given below.[98]

An act[99] which altered an insurance contract so as to exempt the proceeds of the policy when such exemption was not allowed under the act by which the policy was taken out, impaired the obligation of the contract in that it affected the security of the beneficiaries.[100]

The Legislature and railroads have not always fared well at the hands of the other. The Legislature seemed to realize that some of the roads were not paying as much taxes as they should under provisions of their special charters; so they passed a law[101] seeking to impose an additional privilege tax of $10.00 per mile on such railroads as being roads "claiming exemption from state supervision under maximum and minimum provisions of their charters." The Court held in the case[102] that the tax was laid solely with reference to the mere existence of a charter right and was discriminatory; it thus became a penalty.[103] The tax was levied because of the enjoyment by the railroad of its contract right. The section of the act violated both the Federal[104] and the State[105] Constitutions which prohibit impairing the obligation of a contract.

In passing judgment on the constitutionality of an act establishing a county in Mississippi,[106] the Court pointed out that even though two sections[107] might be invalid, they could be eliminated without affecting the balance of the act. One section[108] required the new county to execute and

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[94]Woodruff v. Mississippi, 77 Miss. 68, 25 So. 483 (1899).
[95]Miss. Laws 1875, c. 2, p. 11.
[96]Miss. Laws 1876, p. 350.
[97]Miss. Laws 1884, p. 182.
[98]Forsdick v. Bd. of Levee Comrs., 76 Miss. 859, 26 So. 637 (1899); Woodruff v. State, 66 Miss. 298, 6 So. 235 (1899); McCulloch v. Stone, 64 Miss. 378, 8 So. 236 (1866); Gibbs v. Green, 54 Miss. 592 (1877).
[99]Miss. Laws 1892, c. 53, § 2, p. 42.
[100]Rice v. Smith, 72 Miss. 42, 16 So. 417 (1894); Johnson v. Fletcher, 54 Miss. 628 (1877); Lessley v. Phipps, 49 Miss. 790 (1874); Musgrove v. Railroad Co., 50 Miss. 67 (1874).
[101]Miss. Laws 1898, c. 5, § 66, p. 23.
[102]Gulf & S. I. Ry. v. Adams, State Rev. Agt. and Yazoo & M. V. R. R. v. Adams, State Rev. Agt. (two cases), 90 Miss. 559, 45 So. 91 (1907).
[103]*Ibid.*
[104]U. S. Const.. Art. I, § 10.
[105]Miss. Const. (1890) Art. III, § 16.
[106]Miss. Laws 1916, c. 527, pp. 593-598.
[170]*Ibid.* §§ 14, 16.
[108]*Ibid.*

complete contracts entered into by the old county. The issue raised was that the obligation was thus impaired since the new county was not as good a risk. The Court seemed not to put much weight on the argument advanced.[109]

After the State had granted a charter to a corporation by special act, and the grant was made therein of the power to acquire and enjoy real estate without limit as to value and quality, a subsequent act[110] which prohibited corporations from acquiring agricultural lands could not be applied to the corporation whose charter contained no provision reserving to the State the right to alter or amend it. The charter was granted prior to the adoption of the present Constitution which authorizes the Legislature to limit or restrict the acquiring or holding of lands by corporations,[111] requires incorporation by general law [112] and grants power to the Legislature to alter, amend, or repeal charters of incorporation.[113] The grant to the corporation was a contract within the meaning of both the State and Federal Constitutions.[114]

If the Legislature gave power to the levee commissioners to regulate the affairs of the levee,[115] a contract entered into between the commissioners and its employees could not be affected by a later statute[116] which sought to control the salary of such employees. As applied to the contracts entered into prior to the passage of the latter act, it was an impairment of the obligation of contracts.[117] It is interesting that the lower court held the contracts void and the act (c. 170) valid; while the Supreme Court held the contract valid and the act invalid.

There are several cases which arose that may be designated "if" cases. That is to say, if the Court were to follow the logical route, and apply acts retroactively, the provisions of the acts would be plainly unconstitutional. The Court seeks to save the acts by refusing to give them such a retroactive application even though this is left to judicial interpretation altogether. Such was the result in one of the ex post facto cases.[118] and such was the result in the case[119] in which was involved the constitutionality of an act[120] which made it unnecessary to file proof of publication in order

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[109]Hatten v. Bond, 112 Miss. 590, 73 So. 612 (1916).
[110]Miss. Laws 1912, c. 162, p. 169.
[111]Miss. Const. (1890) § 84.
[112]*Id.* §§ 88, 178.
[113]*Id.* § 178.
[114]Southern Realty Co. v. Tchula Cooperative Stores, 114 Miss. 309, 75 So. 121 (1917).
[115]Miss. Laws 1922, c. 169, p. 172.
[116]Miss. Laws 1922, c. 170, p. 175.
[117]Franklin v. Ellis, 130 Miss. 164, 93 So. 738 (1922).
[118]State v. Clark, 145 Miss. 207, 110 So. 447 (1926).
[119]Bell v. Union & Planters Bank and Trust Co., 158 Miss. 486, 130 So. 486 (1930).
[120]Miss. Laws 1928, c. 69, p. 85.

to set the statute of limitations running against probated claims. Such proof was necessary prior to the statute.[121]

Again the Court save the Legislature embarrassment by saying that it did not intend to eliminate the payment of a just debt made by a county in enforcing the Game and Fish Act[122] practically the whole of which was repealed when a new act replaced it.[123] It was made mandatory on the county to incur a debt (for printing) whether or not the funds were in the treasury. If the Legislature had meant to abrogate the printing contract already completed it would have violated the Constitution. Payment had to be made although the act had been repealed because the law in force at the time the contract was made forms a part of it.[124]

At the beginning of the financial depression in 1932, Mississippi sought to aid a drainage district by providing for the procedure through which it might go to scale down its indebtedness. The act[125] provided a method of revaluation of the outstanding bonded indebtedness and the issuance of liquidation certificates in amounts proportional to the reduced value.[126] The act provided a scheme of bankruptcy for a political sub-division, which was unusual. The Court pointed out that it was difficult to conceive of the insolvency of a taxing district[127] and held the act unconstitutional as applied to bonds issued prior to its enactment.[128]

The sale of land to the State for taxes has raised a number of constitutional questions for the Court to decide, as already evidenced in this discussion.[129] Another case is to be added to the list.[130] By an act of the Legislature,[131] owners of land sold to the State for taxes had three years in which to redeem. A later act[132] limited the period of redemption to two years. This act was unconstitutional as applied to landowners who held title under three-year redemption periods.

> "One right the owner of the land here had at the time it was sold for taxes thereon, was to redeem it any time within three years thereafter, which right the statute would extinguish, if valid for that purpose, at the expiration of two years from the day of the sale of the land to the state . . . thereby cutting off five months and fourteen days from the time in which the owner

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[121]Bell v. Union & Planters Bank and Trust Co., 158 Miss. 490, 130 So. 486 (1930).

[122]Miss. Code Ann. (1930) §§ 4705-4763.

[123]Miss. Laws 1932, c. 123, p. 356.

[124]Tucker Printing Co. v. Bd. of Sup'rs of Attala County, 171 Miss. 608, 158 So. 336 (1934).

[125]Miss. Laws 1932, c. 278, p. 593.

[126]Miss. Laws 1932, p. 52.

[127]Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1934).

[128]*Id. Cf.* Gibbs v. Green, 54 Miss. 592 (1877).

[129]*See* Moody v. Hoskins, 64 Miss. 468 (1886); Woodruff v. State, 66 Miss. 298, 6 So. 235 (1889).

[130]Lee v. Smith, 189 Miss. 636, 198 So. 296 (1940).

[131]Miss. Laws Ex. Sess. 1932, c. 383, § 11.

[132]Miss. Laws 1934, c. 196, §§ 1-2.

thereof could redeem it; but so to do is beyond the constitutional power of the Legislature."[133]

A statute may be constitutional and in operation with respect to some persons and states of facts and unconstitutional with respect to others.[134]

Summary. A bill of rights is an essential part of a constitution of a state. It is a method by which the powers of the government are limited in their action on private rights whether they be rights of property or rights of the person. In all four of the Constitutions of the State, personal rights have been named and protected to a considerably greater extent than property rights.[135] However, the ratio of invalid legislation based on property rights, particularly the contract clause, is much greater than that based on personal rights. One reason for this, it is believed, is that the violation of a property right is much more of a tangible thing; and people are prone to cleave more readily to that which may be touched. That which is immediate more often than not takes precedence over that which is remote.

The economic welfare of a society is based on the extent to which men are willing to uphold the sanctity of a contract. Its obligation must not be impaired because such impairment not only undermines financial integrity, but it saps the vitality of a government founded on the principles of adherence to fundamental law.

It is for this reason that the Legislature could not deprive a man of the "right" to pay a note at the time it was due; nor dissipate the assets of creditors of a bank through a forced sale; nor alter the terms of a debt; nor relieve a farmer from carrying out his obligation; nor alter the conditions under which bonds were sold; nor, unless otherwise constitutionally permitted, alter the charter of a railroad; nor change the previously existing contracts if the State found it necessary to take over lands for non-payment of taxes; nor alter an insurance contract; nor impose a burden on a corporation, not previously existing; nor relieve political subdivisions of their financial obligations.

These are the things that the Court has said the Legislature could not do. Mentioned within the space of a brief paragraph they do not appear formidable, but the implications arising therefrom are basic.

The Legislature has been exceedingly careful not to pass very many ex post facto laws. Only two cases have gone up to the Court involving

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[133]Lee v. Smith, 189 Miss. 636, 647, 198 So. 296, 298 (1940), citing Moody v. Hoskins, 64 Miss. 468 (1886).

[134]*Id.*, citing Russell Investment Corp. v. Russell, 182 Miss. 385, 178 So. 815, 182 So. 102 (1937).

[135]Of a total of approximately fifty rights mentioned in some thirty sections, only about a half dozen concern property rights.

unconstitutional legislation from 1817 down to the present time, and in one of these it was a question of construction; that is, the Court's opinion was based on the point that *if* the act were construed to apply to prior conditions, the law would be invalid. One case involved the carrying of concealed weapons and the other had to do with the possession of a still.

The scarcity of the cases, however, cannot determine the importance of the right. No human right or liberty is more firmly fixed in the law of the land than the provision concerning this type of legislation. A penalty cannot be subject to the whims and fancies of a law-making body, possibly at times swayed by the exigencies of the occasion. Crimes are not so new or so novel that previous provisions have not been set out indicating the extent to which men shall be subject to a penalty. It would be better for a number of men not to be punished as severely as they should be rather than for one man to be punished beyond the needs of society, or the individual himself.

B. *Criminal prosecution; due process*

The next section of importance of the Bill of Rights, judged by the number of cases arising thereunder, covers a number of points of procedural and substantive law protecting a person in criminal action. In 1817, the wording is as follows:

> "That in all criminal prosecutions; the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation, to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and, in all prosecutions by indictment or information, a speedy public trial, by an impartial jury of the county; that he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, but by due course of law."[136]

The framers of the Constitution of 1869 thought it best to divide the substance of this section into two parts. Consequently they declared in one section: No person shall be deprived of life, liberty or property except by due process of law.[137]

And in another section[138] they repeated practically verbatim the balance of the provision as indicated in the Constitutions of 1817 and 1832.

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[136]MISS. CONST. (1817), Art. I, § 10; the identical wording is found in the Constitution of 1832, Art. I, § 10.
[137]MISS. CONST. (1869) Art. I, § 2.
[138]MISS. CONST. (1869) Art. I, § 7.

In 1890 the framers followed the example set in 1869 and made two sections. One is exactly like that of 1869 dealing with due process.[139] Because the other section, however, adds an additional point it will be necessary to set it out in full. The section reads:[140]

> "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in the prosecution for rape, adultery, fornication, sodomy or the crime of nature the court may, in its discretion, exclude from the courtroom all persons except as are necessary in the conduct of the trial."

It is interesting to note that not until 1852 did a case come up to the Court involving a provision of this section.[141] It concerned an act to suppress trade and barter with slaves.[142] A provision of the act sought to liberalize the process of indictment by declaring that the name of the slave, or of his owner, or the kind or quality of the produce or commodity bought or sold need not be stated therein. This was too vague and uncertain. It did not communicate to the accused "the nature and cause of the accusation against him."[143] It was beyond the power of the Legislature to dispense with such a degree of certainty.

As would be expected, the greater number of cases arising under the provisions of the section being considered fall under "due course" or "due process" of law. It is to be noted that this term is used in two different places in the Constitution (Bill of Rights). The one refers to its use as we generally have it interpreted by the Courts, involving, let us say, the provision of the 14th Amendment to the Federal Constitution. This is the connection in which it is used in the provisions previously given. The other provision is found in that section concerning open courts, with justice administered without sale, denial or delay.[144] The latter section, or use, will be discussed later.

A law[145] that eliminates court processes violates due process.[146] Here the Legislature sought to vest title to lands delinquent for non-payment

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[139]Miss. Const. (1890) Art. III, § 14.
[140]*Id.*, Art. III, § 26.
[141]Murphy v. State, 24 Miss. 590 (1852); Allman v State, 24 Miss. 590 (1852).
[142]Miss. Laws 1850, c. 31, §§ 1, 2, p. 100.
[143]Murphy v. State, 24 Miss. 590 (1852); Allman v. State, 24 Miss. 590 (1852).
[144]Miss. Const. (1817) Art. I, § 14; Miss. Const. (1832) Art. I, § 14; Miss. Const. (1869) Art. I, § 28; Miss. Const. (1890) Art. III, § 24.
[145]Miss. Laws 1850, c. 2, pp, 50 *et seq.*
[146]Griffin v. Mixon, 38 Miss. 424 (1860).

of taxes by simply passing a law which did not give opportunity for hearing, or inquiry, or notice. It was void.[147] Nor could land be sold for taxes based on an act[148] which authorized notice of the suit to be given only by publication in a paper. Personal notice must be given.[149] And if a tax-title were void when issued, an act[150] of the Legislature was invalid insofar as it attempted to validate such tax-titles, because it would without due process of law transfer ownership of property.[151]

So far as the records of the cases seem to go, only one case came up before the courts involving the due process clause for the protection of the Negro against unconstitutional legislation. A previous case has been cited involving slaves.[152] In this case the act sought to allow the Probate Court to apprentice Negro minors without notice to them and without their appearing before the court. It was an effort on the part of the Legislature to regulate the relation of master and apprentice. In dispensing with such notice[153] the Legislature exceeded its authority. The court must have jurisdiction both of the subject-matter and the person.[154]

In addition to the cases discussed involving delinquent taxes, the following cases involve property rights. They, too, are based on the due process clause. As will be observed, there are a great many more cases under due process involving property rights than there are involving personal rights.

A provision of a law[155] which stated "that whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this State against any corporation, a reasonable attorney's fee for the appellee shall be assessed by the court and certified by the clerk of the court, and upon affirmance of the judgment, a judgment for the amount so assessed shall be rendered in favor of the appellee and against the appellant" was unconstitutional.[156] It discriminated between classes of *persons* . . . The right of appeal could not be fettered and clogged with reference to the *parties*.[157] It was unwarrantable interference with due course of law.[158] This was an act of the Legislature which sought to give relief to citizens; but the Court showed in its opinion invalidating

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[147]*Id.* at 452.
[148]Miss. Laws 1872, c. 53, §§ 1-2, p. 217.
[149]Brown v. Bd. of Levee Com'rs, 50 Miss. 468 (1874).
[150]Miss. Laws 1872, c. 53, §§ 1-2, p. 217.
[151]Dingey v. Paxton, 60 Miss. 1038 (1883).
[152]Murphy v. State, 24 Miss. 590 (1852); Allman v. State, 24 Miss. 590 (1852).
[153]Miss. Laws 1865, c. 5, §§ 1-2, p. 86.
[154]Jack, a Freedman v. Thompson, 41 Miss. 49 (1866).
[155]Miss. Laws 1882, c. 79, § 1, p. 110.
[156]Chicago, St. Louis & N. O. Ry. v. Moss & Co., 60 Miss. 641 (1882).
[157]*Ibid.*
[158]*Id.* at 647.

the act,[159] that if possible, it would be more odious to the citizens than the corporation.[160]

The Court appears to have had to restrain itself in declaring provisions of the two acts[161] unconstitutional which sought to give power to a coast city to declare what constituted a nuisance, and to abate it. One of the acts named some factors that might be considered nuisances on the beach, such as obstructing the ocean view or the breeze.[162]

Although only one provision of the Constitution was mentioned by the Court by reference to subject matter,[163] the case warrants being placed under possibly two other provisions.[164] The Court indicated that it desired to speak with due respect of any act passed; but in the case under consideration,[165] it was absurd for the Legislature to make such declaration of what constituted a nuisance.[166] The Court was to determine such matters under law.[167]

The Legislature renders a service in controlling money-lending sharks[168] but it must conform to due process. A municipality which patterned an ordinance after a statute[169] authorizing the ordinance, and imposing a privilege tax on a money-lending business which secured loans by a bill of sale or mortgage on designated kinds of personal property but did not impose the same tax on lenders otherwise securing their loans, violated due

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[159]"The discrimination of this act is the more odious because it is against citizens of this state who may be deterred by its provisions from appealing in cases against corporations because of the penalty the act imposes on the unsuccessful appellant. By the act, if a citizen brings an action . . . appeals and fails, he must pay for his failure . . . If a corporation sues him . . . appeals and fails, no fee is taxed against it in favor of the citizen, for it is only when the citizen brings the action that such results follow an unsuccessful appeal." Chicago, St. L. & N. O. Ry. v. Moss & Co., 60 Miss. 646, 649 (1882).

[160]It is doubtless true that the act was designed for the relief of citizens . . . and it was assumed that the corporation would be appellant. The act was intended to deter, however, from the appellate courts corporations . . . or citizens. It was conceived in hostility to citizens as plaintiffs, or corporations as defendants in such actions. In either view, it was partial and discriminating . . . and unconstitutional. Chicago, St. L. & N. O. Ry. v. Moss & Co., 60 Miss. 651 (1882). The Court seemed to say that in one view the act was favorable to the citizen; that in the other view (taken by the Court) the act was conceived in hostility against both citizen and corporation. The two notions expressed by the Court appear to be in conflict. Chief Justice Campbell wrote the opinion, however!

[161]Miss. Laws 1882, c. 303, § 5, p. 362; Miss. Laws 1886, c. 279, § 42, p. 447.

[162]Miss. Laws 1886, c. 279, § 42, p. 447.

[163]Miss. Const. (1869) Art. I, § 10: due compensation.

[164]*Id.* Art. III, § 1: separation of powers; Art. I, § 2: due process.

[165]Quintini v. Bd. of Mayor and Aldermen and Marshall of Bay St. Louis, 64 Miss. 483, 1 So. 625 (1886).

[166]*Id.* at 489.

[167]*Id.* at 491.

[168]There is no need of a statute to prohibit contracts and businesses which the courts have declared void as against public policy, however. *See* Woodson v. Hopkins, 85 Miss. 171, 37 So. 1000 (1904).

[169]Miss. Laws 1904, c. 76, § 57, p. 71; Miss. Code (1906) § 3836.

process; and the statute authorizing the ordinance was unconstitutional.[170]

A statute[171] which provided for the numbering and registering of automobiles and provided for a payment of a registration fee out of all proportion to the cost of such registering and numbering was void.[172] Police power must conform to due process. The State has the right to regulate the use of its highways but it must be done in a reasonable manner. The amount to be collected by the statute varied from five to twenty-five dollars depending on the horse power of the automobile. The cost of the service performed was less than one dollar. The State sought to uphold the statute, not on the power of taxation, but on its police power. It was not a fair exaction.

Nor could the Legislature help employees collect from their employers when such a relation was confined to manufacturers, and the act did not apply to other classes of individuals or corporations. The act in part[173] sought to impose a penalty on manufacturers who did not pay their employees every calendar month. Such a provision arbitrarily selected manufacturers as a class, without any reasonable and proper basis for the classification.[174]

The time of the decision of the instant case,[175] based on a law passed the same year,[176] would seem to indicate that the Legislature would not overlook placing in an act which authorizes special assessments and bond issues a number of important procedural steps. Among the omissions in the act mentioned were: provision for giving effective notice, either personal or by publication and for fixing the time of the meeting of a board which should render judgment against property owners. The Court reluctantly, but confidently, declared such statute contrary to both the Federal and State Constitutions.[177]

The Court would not pass on the constitutionality of a statute when a previous law that was in effect fell on the appellant on the same point. The appellant contested in this case[178] the validity of an act[179] which compelled him as a resident of the State to pay income tax on earnings made outside the State. Even though the act were held invalid, he still would

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[170]Rodge v. Kelly, 88 Miss. 209, 40 So. 552 (1906). *See* Hyland v. Sharp, 88 Miss. 567, 41 So. 264 (1906).

[171]Miss. Laws 1912, c. 108, § 1, p. 88.

[172]State v. Lawrence, 105 Miss. 58, 61 So. 975 (1913).

[173]Miss. Laws 1912, c. 141, § 2, p. 146.

[174]Sorenson v. Webb, 111 Miss. 87, 71 So. 273 (1916)

[175]Bouslog v. City of Gulfport, 112 Miss. 184, 72 So. 896 (1916).

[176]Miss. Laws 1916, c. 128, p. 185. It is unusual to have a statute declared unconstitutional within the year of its enactment.

[177]It violated Art. III, §§ 14 and 24 of the State Constitution and due process clause of the Fourteenth Amendment to the Federal Constitution.

[178]Lawrence v. Miss. State Tax Comm., 162 Miss. 338, 137 So. 503 (1931).

[179]Miss. Laws 1928, c. 32, p. 50.

have to pay, for a previous statute[180] on the constitutional point raised had been upheld.[181]

When is a tax a penalty? It is one at least if the statute so declares (and is constitutional in its declaration!). And if it is a penalty, the Legislature cannot dispense with judicial processes and authorize administrative officers to collect it. Consequently a statute[182] which sought to compel a person to pay a penalty (financial) for selling or giving away liquor unlawfully was unconstitutional if it put into the hands of executive officers (the auditor or the sheriff) the exercise of the power to seize the property of a citizen to enforce an unadjudged penalty. That could not be done under due process.[183]

The Legislature set up County Courts.[184] A number of its provisions were challenged [185] but only in one particular[186] did the Court invalidate the act, specifically holding that that provision did not effect the constitutionality of the entire act.[187] The section invalidated sought to authorize the Circuit Court to try appeals from the County Courts anywhere in vacation without notice.[188] This violated due process. But the other provisions of the Constitutions alleged to be violated were not.[189] The case is interesting not only from the standpoint of the subject matter involved, but for the rules of construction mentioned[190] and it should be noted that two of the justices dissented.[191]

Here is a very interesting case.[192] The Legislature provided that the insanity of a defendant a the time of the commission of the crime should not be a defense against indictments for murder.[193] The Court in a *per curiam* decision held the provision in contravention of the due process

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[180]Miss. Laws 1924, c. 132, § 11, p. 141.

[181]State *ex rel* Knox v. Gulf, M. & N. R. R., 138 Miss. 70, 104 So. 689 (1929). On this same point, *i. e.*, the previous law would be in effect, see the following cases: Claiborne County v. Morehead, 145 Miss. 867, 111 So. 372 (1927); Moore v. Tunica County, 143 Miss. 821, 107 So. 659 (1926); Buford v. State, 146 Miss. 66, 111 So. 850 (1926); Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925); Pearl River County v. Lacey Lumber Co., 124 Miss. 85, 86 So. 755 (1920); American Express Co. v. Beer, 107 Miss. 529, 65 So. 575 (1914); Adams v. Standard Oil Co., 97 Miss. 879, 53 So. 692 (1910).

[182]Miss. Code Ann. (1892) § 1590.

[183]McBride v. State Rev. Agt., 70 Miss. 716, 12 So. 699 (1893).

[184]Miss. Laws 1926, c. 131, p. 218.

[185]Miss. Laws 1926, §§ 1, 2, 5, 6, 7.

[186]*Id.* § 5.

[187]State *ex rel* Knox v. Speakes, 144 Miss. 125, 109 So. 129 (1926).

[188]*Id.* at 162.

[189]*Id.* at 156, citing Miss. Const. (1890) §§ 146, 156, 159, 171, 172.

[190]*Id.* at 161-62.

[191]McGowen, J., and Smith, C. J.

[192]Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).

[193]Miss. Laws 1928, c. 75; Miss. Code Ann. (1930) §§ 1327, 1328.

clause of the State Constitution.[194] Specially concurring opinions and a dissenting opinion[195] were written.

Among other provisions of the Constitutions violated (the term "Constitution" liberally interpreted to cover a point made by one of the Justices) are: cruel and unusual punishment,[196] the equal protection clause of the Federal Constitution,[197] the right of the accused to be heard . . . and confronted by the witnesses,[198] the powers inherent in the people,[199] and the law of nature.[200]

Summary. Not only must no ex post facto law be passed, but after the commission of a criminal act, certain procedural guarantees must be given to the individual. And in order that property rights not be overlooked, due process must apply to them as well.

The Court has further ruled that a man had a right (1) to be heard, (2) to demand the nature of the accusation, (3) to compel the person who testified against him to appear before him, (4) to have the whole power of the State behind him in getting people to come and testify in his behalf, (5) to have a speedy[201] public trial,[202] (6) to obtain an impartial jury from the vicinity, (7) to be relieved from testifying against himself, and (8) to have the protection of all that has been developed under the judicially-defined meaning of "due course" or "due process" as it applies to (a) life, (b) liberty, or (c) property. The cases involving property rights are much more numerous than those involving personal rights.

From the standpoint of personal protection, the Court held that minors could not be apprenticed without their appearing before the proper court; the Circuit Court could not exercise appellate jurisdiction in vacation without notice; insanity should be considered a proper defense; and during the course of a trial the defendant must be allowed to accompany the jury when it visited a scene affecting the guilt of the defendant.

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[194]MISS. CONST. (1890) Art. III § 14.

[195]McGowen, J. delivered a specially concurring opinion in which Cook, J. concurred; Ethridge, J. delivered a specially concurring opinion in which McGowen and Cook, J. concurred; Griffith, J. delivered a specially concurring opinion in which Anderson, J. concurred, and Ethridge, J. in part. Smith, C. J. delivered a dissenting opinion. (The Court consists of six members.)

[196]MISS. CONST. (1890) Art. III, § 28.

[197]U. S. CONST. Art. XIV.

[198]MISS. CONST. (1890) Art. III, § 26.

[199]*Id.* § 32.

[200]Sinclair v. State, 161 Miss. 171, 132 So. 588 (1931); Foster v. State, 70 Miss. 755, 12 So. 822 (1893); Logan v. State, 50 Miss. 269 (1874).

[201]It would seem that the courts themselves could go far in eliminating the well-grounded criticism of delay in the administration of justice by a judicially applied technique in the interpretation of this word.

[202]In 1890, an addition was placed in the section to permit the court in its discretion to exclude from the court room all persons other than those needed for the conduct of the trial. The offenses mentioned under which they may be done are rape, adultery, fornication, sodomy or the crime of nature.

From the standpoint of property rights, the Court set up certain limitations to be observed: if the Legislature prohibited trading with the slaves, the law must require that the indictment for violation of same be specific; title to land could not pass without opportunity for hearing; personal notice must be given in connection with a hearing; if void when issued a title to land would not pass even though the Legislature authorized it. In a civil suit, a citizen could not be treated more unfavorably than a corporation; the Legislature could not decide what constituted a nuisance and authorize subsequent abatement without judicial determination; the imposition of a privilege tax on money lenders must fall on all alike; an automobile registration fee must bear some relation to the cost of administration; manufacturers alone could not be singled out and compelled to pay their employees at stated times; property owners must know when their property was to be burdened; recovery under probated claims already allowed could not be altered; a resident of the State must pay income tax on earnings made outside of the State; a sheriff could not meet a person on the road, take his property, and sell it immediately; and if a tax were levied as a penalty, court process could not be dispensed with.

Of the twenty cases decided on this part of the Bill of Rights, only one was based on a provision other than due process; and of the nineteen cases on due process, six dealt with personal rights while thirteen dealt with property rights. It will not do to draw too hasty a generalization, however, as to the relative worth of the two kinds of rights. It would appear at first glance that the Legislature is more apt to pass laws which burden property. On the other hand, it may mean that those who have property are more able to get into the courts. Not every unconstitutional law has been carried to the courts.

C. *Double jeopardy; eminent domain.*

The subject matter here, based on the number of cases involved, runs third. Eight times the Court had to interfere, five under the Constitution of 1832 and three under that of 1869. All involve eminent domain.

> "No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall any person's property be taken or applied to public use without the consent of the Legislature, and without just compensation being first made therefor."[203]

Although the Constituion of 1817 was not involved in any of the cases, it is interesting to note that the above provision differed from that of our first Constitution in two particulars: "of the Legislature" was "of his representatives"; and the word "first" was not found in 1817.[204]

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[203]MISS. CONST. (1832) Art. I, § 13.
[204]MISS. CONST. (1817) Art. I, § 13.

The provisions concerning *double jeopardy* and *eminent domain* were separated in the Constitution of 1869;[205] as was also the case in 1890.[206] Again, although the latter Constitution was not involved in any of the cases, it is of particular interest that the section dealing with the taking of private property stated specifically that the court was to pass on the question of whether the taking was for public use, without regard to any legislative assertion relative thereto.

The first case to come before the Court involved a provision of an act of the Legislature incorporating a railroad.[207] This provision stated that in assessing damages in the taking of property, the jury should take into consideration the benefits which resulted from constructions already made. Such a judgment was not compensation. The Constitution requires that the compensation shall be made first. The framers did not use this word uselessly; the sentence is perfectly intelligible, and accords with first principles.[208]

The Court cited Chancellor Kent[209] in holding that the offer must precede or be concurrent with the seizure and entry upon private property. In addition, the Court made the observation that it was not out of place to remark that one of the members of the Court was also a member of the Convention and "recollects that the bill of rights was framed with a view to secure to individuals a previous indemnity for property taken."[210]

The Legislature seemed to have forgot this decision, for in 1852 they granted another charter to a railroad incorporating the same provision.[211] Again the Court held the provision unconstitutional.[212] There was no question about the essential and inherent right of eminent domain. It was an essential element of sovereignty and would exist without any written provision on it. However, the party from whom the land was taken was entitled to the cash value of the land. He was entitled to be paid in money. The Legislature could no more prescribe how he should be paid than it could prescribe how much or how little was to be paid. Com-

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[205]MISS. CONST. (1869) Art I, § 5 incorporates double jeopardy, § 10, that of eminent domain, *i. e.*, taking private property for public use except upon due compensation.

[206]MISS. CONST. (1890) Art. III, § 2, double jeopardy, § 17, eminent domain.

[207]Miss. Laws 1836, p. 170, § 1.

[208]"To determine between the constitution and the legislature, is often embarrassing, and always demands a cautious and deliberative investigation. The acts of the legislature should be sustained, if possible, the constitution *must* be preserved inviolate." Thompson v. Grand Gulf R. R. & B. Co., 3 How. 240, 247 (Miss. 1839). *Cf.* Hinds County v. Johnson, 133 Miss. 591, 98 So. 95 (1923). This rule is not so strict when applied to the State or its political subdivision. It is sufficient that the public faith and credit be pledged to a reasonably prompt ascertainment and payment and an adequate provision for enforcing the pledge.

[209]Thompson v. Grand Gulf R. and B. Co., 3 How. 240, 249 (Miss. 1839).

[210]*Id.* at 251.

[211]Miss. Laws 1852, c. 21, § 8, p. 70.

[212]Brown v. Beatty, 34 Miss. 227 (1857).

pensation in money must be made first and prior to the taking. And the Legislature could not take into consideration the estimated enhancement of the value of the remaining property of the individual.[213]

Just a year later the Court was asked to pass on another case involving the same railroad and the same provision. The Court was rather eloquent in the matter this time.[214] And to impress those concerned with the fact that it was serious in such matters, and possibly to make it more difficult to bring later cases for consideration involving the same point, the Court in addition to relying on the provisions of the Constitution guaranteeing that compensation be paid first, supported its conclusion of the invalidity of such a legislative act by throwing in the provision of the Constitution that provided for open courts with due course of law,[215] the one involving the principle of separation of powers,[216] and the one guaranteeing trial by jury.[217] It pointed out that the spirit and policy of our institutions were at war with the doctrine of legislative omnipotence. Ours was a government founded upon an express, written compact . . . fixing the limits and marking the bounds of legislative, executive, and judicial powers; our Constitutions originated in a spirit of distrust of governmental powers and from a conviction that, unrestrained, they would tend toward despotism. Hence the great necessity, on the part of the judicial department not only to scrutinize well the conduct of the other departments but especially to guard itself against the natural influences which the clamors of the powerful many are calculated to exert. Thus the humblest, weakest citizen, claiming a legal right, might assert it.[218]

The Legislature attempted, by a simple act of legislation, to transfer title to land acquired by the State for non-payment of taxes.[219] Not only would such an act violate due course of law[220] but it would be in violation of the constitutional guarantee dealing with the taking of private property. The Legislature could levy taxes, but the collection involved the exercise of executive and judicial functions; and a simple act of the Legislature without hearing, without inquiry, and without notice, was in violation of the organic law and, therefore, void.[221] The Court confirmed its position governing eminent domain in other cases.[222]

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[213]*Id.* at 241.
[214]Isom v. Miss. Cent. Ry., 36 Miss. 300 (1858).
[215]Miss. Const. (1832) Art. I, § 14.
[216]*Id.*, Art II, § I.
[217]*Id.*, Art. I, § 28.
[218]Isom v. Miss. Cent. Ry., 36 Miss. 310, 311 (1858).
[219]Miss. Laws 1850, c. 2, p. 50.
[220]Miss. Const. (1832) Art. I, § 10.
[221]Griffin v. Mixon, 38 Miss. 424 (1860).
[222]Board of Levee Com'rs for Yazoo-Miss. Delta v. Dancy, 65 Miss. 335, 3 So. 568 (1887); Quintini v. Board of Mayor and Aldermen and Marshall of Bay St. Louis, 64 Miss. 483, 1 So. 625 (1886); Pearson v. Johnson, 54 Miss. 259 (1876); Donnaher v. State, 8 S. & M. 649 (Miss. 1847).

Summary. Double jeopardy and eminent domain provisions have been inserted in all four Constitutions,[223] but only under the Constitutions of 1832 and 1869 were there any cases involving these provisions. Furthermore, the eight cases decided were on eminent domain.

Before private property should be taken for public use the compensation must be made first; and the judgment rendered could not take into consideration the benefits accruing to the remaining property on account of its having been taken. The Court has been insistent that a man's property cannot be taken without his consent and not until compensation in money has been made. Nor did the right to institute court proceedings to get the compensation at a later date satisfy the constitutional provision. The compensation simply, but emphatically, must be made before the taking. The procedure, whether involving the taking through the non-payment of taxes and a legislative declaration of the transfer of title or under eminent domain, in the final analysis and for the ultimate determination of the rights involved, was for the courts to determine.

D. *Open courts; remedy by due course of law; justice administered without sale, denial, or delay.*

> "That all courts shall be open, and every person for any injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law; and right and justice administered without sale, denial, or delay."[224]

A suit was begun by a bank in the lower court on a debt due it with judgment for the defendant. After an appeal by the plaintiff to the Supreme Court,[225] plaintiff's charter was dissolved by the lower court under a prior statute, ordering dissolution under certain conditions.[226] This statute provided for the appointment of trustees and the preservation of the property (including debts due the bank) of the bank, said property to be applied to the debts of the bank. Later, however, the Legislature amended the statute[227] and provided for selling under court order for cash to the highest bidder, all the property and evidences of debts of banks whose charters were forfeited.

The Court held that by the act authorizing dissolution, the creditors of the bank acquired rights which the amended act sought to divest. One

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[223]*Cf.* MISS. CONST. (1817) Art. I, § 13; MISS. CONST. (1832) Art. I, § 13; MISS. CONST. (1869) Art I, §§ 5, 10; MISS. CONST. (1890) Art. III, §§ 17, 22.

[224]This is one provision in which the wording remained practically the same throughout the four Constitutions: MISS. CONST. (1817) Art I, § 14; MISS. CONST. (1832) Art. I, § 14; MISS. CONST. (1869) Art. I, § 28; MISS. CONST. (1890) Art. III, § 24. The only exception is that in 1890, the framers inserted the words "shall be" before the word "administered."

[225]Commercial Bank of Natchez v. Chambers, 8 S. & M. 9 (Miss. 1847); *see* Coffman v. Bank of Ky., 40 Miss. 29 (1866).

[226]Miss. Laws 1843, c. 3, §§ 1, 8, p. 52.

[227]Miss. Laws 1846, c. 9, §§ 3-7, p. 118.

of those rights was the right to enforce the payment of the debts in a court of law, which right would be denied by the act of ordering a sale of the debts to the highest bidder for cash. The amended act must be declared void.

A statute which under eminent domain proceedings required the jury, in estimating damages, to take into consideration the benefits accruing to the property, denied to the property owner the rights guaranteed by this section.[228]

The Legislature divided the State into four districts for judicial purposes, required the Supreme Court to hold a term once in each year in each district, and restricted the cases to those arising within each district.[229] The Court pointed out that that provision violated all the provisions of the Constitution relative to setting up the Supreme Court (High Court of Errors and Appeals), particularly that provision of the Constitution of 1832 concerning the holding of court,[230] an amendment thereto which was adopted by the convention of 1865,[231] and the provision concerning open courts.[232] When the Court met it was to consider all cases pending from all over the State, so that this act to restrict it to cases arising within the district was unwarranted and was to be disregarded.[233]

Failure of the Legislature to provide for giving notice when property was to be assessed and bonds issued violated the due course of law provision of this section.[234]

Summary. Our constitutional development shows that there has never been much doubt that the courts must be open to all. This is not to say that in the practical application, all people have equal opportunity to avail themselves of this right; but it is one of the basic principles of the law of the land that legally there shall be given to all alike an opportunity to have their rights adjudicated and protected by the agency whose supreme task it is to see that law is administered justly and impartially for all.

However, the few cases decided that were based on this section pertained primarily to property rights. The exception was the *opinion*[235] of the Court determining the invalidity of an act before a case was brought. The right of appeal could not be destroyed; a legislative declaration of

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[228]Isom v. Miss. Cent. Ry., 36 Miss. 300 (1858).

[229]Miss. Laws 1867, c. 376, §§ 1-3, p. 474.

[230]Miss. Const. (1832) Art. IV, § 7.

[231]This amendment can be found in Ethridge, Mississippi Constitutions, p. 528.

[232]Miss. Const. (1832) Art. I, § 14.

[233]Opinion of the Court Construing the Act of the Legislature, 41 Miss. 54 (1886). *See* Mobile and O. Ry. v. Mattan, 41 Miss. 692 (1868).

[234]Miss. Laws 1916, c. 128, p. 185, invalidated in Bouslog v. City of Gulfport, 112 Miss. 184, 72 So. 896 (1916).

[235]Italics supplied.

enhanced value to be considered as part payment in taking private property prevented the owner thereof from proper access to the courts; and failure to provide for notice in assessing property denied the person affected "remedy by due course of law."[236]

E. *Some additional provisions involved infrequently.*

Jury trial, civil. The first case under the Constitution of 1832 (the second reported case under our State constitutional development) came up under that provision of the Constitution[237] which set out that all freemen in forming a social compact were equal in rights and nobody was entitled to emoluments or privileges from the community except in consideration of public service. The act sought to permit sureties on notes who had paid the notes following judgment against them, to obtain judgments against the principal by simple motion before the court.[238] The Court said that the Legislature could not do that.[239] Two provisions of the Constitution prevented it: the one already referred to immediately above; the other which guaranteed the right of trial by jury.[240] To allow the surety such procedure as set out would be tantamount to giving him an exclusive privilege over others equally entitled in justice to the payment of their claims. To permit such a motion and judgment would violate the constitutional provision dealing with jury trial. Facts were to be determined for which juries were mandatory.[241]

Tenure of Office. The Legislature set up an inferior court of chancery.[242] One section authorized the Governor to appoint a vice-chancellor to hold office "until the next general election in 1843, and until his successor is qualified."[243] Since the Legislature had failed to pass a law providing for a method by which a successor could be elected this part of the act was unconstitutional.[244] The Constitution provides that the tenure of office shall be for some limited period of time,[245] and since there is no law by which a successor can be qualified, this was tantamount to extending the term indefinitely by legislative fiat.

Qualifications for holding office. The Legislature sought to raise the standards of education by requiring that no person should be eligible to the office of county superintendent of education who did not hold a

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[236]This is not "due course" or "due process" of law previously discussed.
[237]Miss. Const. (1832) Art. I, § 1.
[238]Miss. Rev. Code (Poindexter 1822) c. 13, § 160, p. 142.
[239]Smith's Administrator v. Smith, 1 How. 102 (Miss. 1834).
[240]Miss. Const. (1832) Art. I, § 28.
[241]*Ibid; see* Miss. East. R. R. v. Wymond Cooperage Co., 93 Miss. 73, 46 So. 557 (1908); Isom v. Miss. Cent. R. R., 36 Miss. 300 (1858).
[242]Miss. Laws 1842, c. 3, §§ 1-18, p. 57; Miss. Code (1842) c. 54, Art. XX, §§ 1-18, p. 775.
[243]Miss. Laws 1842, c. 3, § 13.
[244]Houston v. Royston, 7 How. 543 (Miss. 1843); *see* Burnham v. Sumner, 50 Miss. 517 (1874).
[245]Miss. Const. (1832) Art. I, § 30.

first-grade certificate.[246] This qualification applied to those who were to be elected. The Court held this an effort on the part of the Legislature to add to the constitutional qualifications for office.[247] The reasoning seems to be somewhat strained since it denies to the Legislature power not prohibited by the Constitution. The usual interpretation is that if the Legislature is not denied a power, the power may be exercised. But since the Constitution laid down no qualifications whatever for such officers in the provision dealing with county superintendents,[248] the Court decided that the framers of the Constitution did not intend that any qualifications be required. It arrived at this conclusion by pointing out that one part of the Constitution prohibited the requirement of property or educational qualifications for an elector;[249] another designated all male inhabitants (with certain exceptions) twenty-one years old, etc., as qualified electors;[250] and another provided that no person should be eligible to office who was not a qualified elector.[251] Therefore, the only requirement for any office mentioned by the Constitution, unless otherwise specified, was that the person be a qualified elector. The Court overruled[252] a prior decision concerning this particular office.[253]

Involuntary servitude. A provision of an act[254] sought to punish a laborer, renter, or share cropper who made a contract in writing and later made a second contract without giving notice of the first. The act was unconstitutional because it classified the failure as a misdemeanor with punishment by fine.[255] It imposed involuntary servitude as punishment for an act other than a crime.[256] It was a civil contract yet there was nothing in the law aimed at the other party thereto. The State has the right to maintain social order but it cannot through fine (and imprisonment if fine is not paid) punish a party to a contract for a violation thereof.

Prosecution by information. An indictment charging desertion and failure to support one's family was brought under the provision of a statute which made such an offense a felony punishable by imprisonment. The indictment was returned "upon complaint made under oath by any per-

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[246]Miss. Laws 1888, c. 36, § 2, p. 57.
[247]Wynn v. State of Miss., 67 Miss. 312, 7 So. 353 (1899).
[248]Miss. Const. (1869) Art. VIII, § 4.
[249]*Id.*, Art. I, § 18.
[250]*Id.*, Art. VII, § 2.
[251]*Id.*, Art. VII, § 4.
[252]Burnham v. Sumner, 50 Miss. 517 (1874). In this case the Court held the provision *extra-constitutional*,—not unconstitutional!
[253]In Wynn v. State, 67 Miss. 321, 7 So. 355 (1899), the court commented on the *Burnham* case, cited *supra* note 252.
[254]Miss. Laws 1900, c. 101, p. 140; Miss. Code (1906) § 1147.
[255]State v. Armstead, 103 Miss. 790, 60 So. 778 (1912).
[256]Miss. Const. (1890) Art. III, § 15.

son."[257] This statute clearly violated that section of the Constitution which prohibits a person's being proceeded against criminally by information.[258] It was void.[259] Another case on the same point was tried in the lower court before invalidation of the act; on appeal, although the appellant pleaded guilty, the Supreme Court reversed the verdict of guilty because of the invalidity of the act. The man was guilty all right but the grand jury did not say so![260]

Searches, seizures. It is rather unusual that there should be only two cases of interest under this provision. In 1924 the Legislature enacted a statute providing that the testimony of an officer and the introduction of evidence (liquor) should not be rendered incompetent by reasons of the fact that the officer did not have a proper search warrant.[261] The Court held this provision unconstitutional[262] as being in conflict with the provisions concerning unreasonable searches[263] and seizures and being confronted with witnesses.[264] The Court saw fit at this late date in the development of judicial review of legislation, to say: "When the Constitution of 1890 was ordained, the judicial power conferred therein on courts embraced the power to construe the Constitution and to declare acts of the Legislature contrary to the Constitution as construed by the court to be void."[265]

In another case coming up for judicial determination, there was involved a provision of an act which sought to aid the breaking up of gambling. One section of the act authorized officers to arrest persons for gambling when they knew or had reason to suspect them guilty, and to break into any house, or room, with or without warning and with or without a search warrant.[266] The Court held that since the statute authorized an arrest without warrant for a misdemeanor not committed in the presence of the officer who made the arrest, and particularly since it dealt with breaking into a person's house, the act was in violation of the Constitution.[267] With one of the Justices dissenting, the Court held, however, that the men in the game other than the one in whose house they were arrested, could be prosecuted because for a search to be unlawful, officers

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[257]Miss. Laws 1920, c. 212, §§ 1-2, p. 304.
[258]Miss. Const. (1890) Art. III, § 27.
[259]State v. Sansome, 133 Miss. 428, 97 So. 753 (1923).
[260]Norwood v. State, 136 Miss. 272, 101 So. 366 (1924).
[261]Miss. Laws 1924, c. 244, § 3, p. 341.
[262]Orick v. State, 140 Miss. 184, 105 So. 465 (1925).
[263]Miss. Const. (1890) Art. III, § 23.
[264]*Id.*, Art. III, § 26.
[265]Orick v. State, 140 Miss. 191, 105 So. 465 (1925). See this case for further interesting comment on judicial review. *See* Iupe v. State, 140 Miss. 279, 105 So. 20 (1925); Gardner v. State, 141 Miss. 192, 105 So. 476 (1925).
[266]Miss. Code Ann. (1930) § 1235.
[267]Polk v. State, 167 Miss. 506, 142 So. 480 (1932).

must invade a man's own house. The visitors were dealt with more severely than the host.

Imprisonment for debt. The Legislature passed a law dealing with giving worthless checks. It eliminated the requirement of intent to defraud or knowledge of the insufficiency of funds on the part of the person giving the check. If a check were not honored, the payor would be guilty of a misdemeanor; but if on notice he paid the check, prosecution would be dismissed.[268] The Court held this provision to be clearly a debt-collecting one.[269] It issued the criminal processes of the courts to enforce the collection of debts and therefore violated a provision of the Constitution which prohibits imprisonment for debt.[270] Here the giving of the check involved neither moral turpitude nor evil intent. This Legislature might *make* such an act a crime if it did not violate some constitutional provision; but when the enforcement of such a statute resulted in the violation of a constitutional prohibition, the statute must fail.[271]

F. *The Federal Constitution.*

In invalidating a few of the laws previously referred to, the Court predicated its decisions not only on some particular provision of the Bill of Rights of one of the State Constitutions but reinforced its conclusions by mentioning two or three provisions of the Federal Constitution.

1. "No state . . . shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . ."[272]

The provision of a State statute which did not prohibit one who had "good and sufficient reasons to apprehend an attack" from carrying concealed weapons could not be repealed so as to affect adversely the action of a person under the former statute. A conviction under the later statute based on a prior action of the individual was void.[273]

A statute which altered the contracts under which bond-holders acquired their bonds by abating taxes legally due, which taxes were to be used to pay said bonds, impaired the obligation of contracts.[274] A privilege tax levied on a railroad whose charter by special grant exempted such levy was unconstitutional.[275] Likewise, if the Legislature, through charter, granted to a company the right to acquire and enjoy real estate "without limit as to value and quality," a subsequent act which prevented corporations from acquiring agricultural lands would be void as applied to the

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[268]Miss. Laws 1924, c. 172, p. 223; Miss. Code Ann. (1930) §§ 942, 925.
[269]State v. Johnson, 163 Miss. 521, 141 So. 338 (1932).
[270]Miss. Const. (1890) Art. III, § 30.
[271]State v. Johnson, 164 Miss. 529, 141 So. 340 (1932).
[272]U. S. Const., Art. I, § 10.
[273]Lindzey v. State, 65 Miss. 542, 5 So. 99 (1888).
[274]*See* Woodruff v. State, 66 Miss. 298, 6 So. 235 (1889).
[275]Gulf & S. I. R. R. v. Adams, 90 Miss. 559, 45 So. 91 (1907).

company mentioned. The State might under its police power prevent the company from monopolizing agricultural lands but to withdraw the right altogether in the face of the charter would be void.[276]

When the State set up a levee board and authorized it to enter into contracts for the payment of salaries of employees, a later act which applied to contracts made subsequently could not affect the salaries of the employees already holding a contract with the board.[277] Further, if the State inaugurated a program of game and fish preservation, making it mandatory on the part of the county to incur certain obligations, the repeal of the statute would not affect the obligations already incurred. All oustanding obligations must be met.[278]

2. " . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."[279]

A privilege tax which was levied on money-lending businesses that secured their loans by bill of sale or mortgage on designated kinds of personal property, and which was not levied on such businesses otherwise securing their loans, violated the section of the Federal Constitution referred to above.[280]

A registration fee on automobiles out of all proportion to the cost involved violated due process.[281] And a statute which permitted a sheriff to seize an automobile or other personal property for nonpayment of a highway privilege tax, without inquiry, or without notice to the owner, was quite defective. It violated every element of due process.[282]

The Legislature could not impose a penalty of a reasonable attorney's fee upon a manufacturer for failure to pay his employees once every calendar month, recoverable, if the employee has employed an attorney, by suit within ten days after demand, in addition to the amount of the wages due; provided this penalty is not imposed on any other class of individuals or corporations. It is an improper basis of classification.[283]

Any act which authorizes the issuance of bonds and the levying of special assessments, without notice to the tax-payers or without

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[276]Southern Realty Co. v. Tchula Cooperative Stores, 114 Miss. 309, 75 So. 121 (1917).
[277]Franklin v. Ellis, 130 Miss. 164, 93 So. 738 (1922).
[278]Tucker Printing Co. v. Bd. of Sup'rs, 171 Miss. 608, 158 So. 336 (1934).
[279]U. S. Const., Amend. XIV, § 1.
[280]Rodge v. Kelly, 88 Miss. 209, 40 So. 552 (1906).
[281]State v. Lawrence, 105 Miss. 58, 61 So. 975 (1913).
[282]Holloway v. Jordan, 170 Miss. 99, 154 So. 340 (1934).
[283]Sorenson v. Webb, 111 Miss. 87, 71 So. 273 (1916).

any provisions for the meeting of the board to render judgment against the property owners, can confidently be invalidated.[284]

Finally, one case was based on the Thirteenth Amendment to the Federal Constitution. An act which seeks to punish by fine (which necessarily implies imprisonment on failure to pay the fine) a renter or sharecropper for entering into a second contract without giving notice of a prior existing contract, is involuntary servitude for a breach of a civil contract. It is therefore void as to conflict with the Federal Constitution.[285]

Summary. A few additional provisions of the Bill of Rights have been involved from time to time in the determinations of invalid acts.

The notion of legal equality would prevent the Legislature's giving a surety on a note preferred claim against a principal by simply allowing the surety to go before the court, and without the intervention of a jury, obtain a judgment. If the Constitution specifies that all offices of the State are to be limited in terms, the Legislature cannot authorize a person to hold office until his successor has qualified without providing for such succession.[286]

The Legislature desired to have a better qualified man in the office of county superintendent of education and provided for certain standards of attainment. The Court said this was unconstitutional. The Constitution sets out the qualifications and these cannot be altered.[287]

Contracts cannot be made the basis of criminal prosecution, nor can any person, for any indictable offence, be proceeded against criminally by information (even though the man should plead guilty). A legislative provision which permits introduction of evidence secured without proper warrants, or one which allows breaking into one's house on suspicion of gambling without a warrant, is unconstitutional.

The courts are not to be used as mere collection agencies. Such would have been the result, so the Court said, had the legislative enactment been allowed to stand which, in effect, threatened to prosecute a person unless he paid a check and then dismissed the prosecution if he did pay.

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[284]Bouslog v. City of Gulfport, 112 Miss. 184, 72 So. 896 (1916).

[285]State v. Armstead, 103 Miss. 700, 60 So. 778 (1912).

[286]Houston v. Royston, 7 How. 543 (Miss. 1843). This case is one hundred years old and is still good law, according to the present Constitution, Miss. Const. (1890) § 20.

[287]Miss. Laws 1888, c. 36, § 2, p. 57; Wynn v. State, 67 Miss. 312, 7 So. 353 (1889). This was changed in the Constitution of 1890 to permit the Legislature to require certain standards of professional attainment. Miss. Const. (1890) §§ 133, 202, 204. Legally, the qualifications are not as high for state-wide positions as are required for county positions.

Apparently in order to give its decision a more substantial base, the Court in a number of cases based its opinion on both the State and Federal Constitutions. Fundamentally involved, however, was the interpretation of the State Constitution concerning which the State court is the final arbiter as it affects State Constitutional law. Involved in the decisions were the implications that had the Court not invalidated the acts on some State Constitutional provision, an appeal to the federal court would have been in order.[288]

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[288]For the finality of state court decisions when no federal question is involved see 38 STAT. 278 (1914), 28 U. S. C. A. § 71.

I

DOES THE PRESIDENT STILL HAVE AMNESTYING POWER?

*William A. Russ, Jr.**

W. Y. Elliott in his article, *Amnesty,* says that both President and Congress have the prerogative of amnesty, and he cites certain court decisions to that effect.[1] It is the thesis of this paper that Congress alone has amnestying power—a power which lies dormant during usual times but which, during and after wars and rebellions, may become extremely important. A discussion of the question at the present time is not entirely academic. It is devoutly to be hoped that no rebellion will occur against the United States during this war; and yet the recent coal strikes and the attitude of John L. Lewis force the subject of amnesty upon the attention of lawyers, if upon no one else.

According to a United Press despatch of May 17, 1943 the War Labor Board "accused John L. Lewis of virtual treason for his continued defiance of its efforts to settle the coal dispute". The Board is quoted as saying that "this defiance challenges the sovereignty of the United States in time of war and gives aid and comfort to our enemies". Giving aid and comfort to the enemies of the United States is one of the definitions of treason in the Constitution. Others have discussed Lewis and the miners in like terms. Suppose the 500,000 miners should strike against the Government while the mines are under public operation, and suppose the United States declared the workers to be in a state of rebellion. It is questionable whether even Lewis or the miners would go so far as to force the Government to such an extreme; but if it did happen and if we still won the the war, a demand would arise, after peace had been won, that these half million men be amnestied. The question as to who—Congress or the President—had the authority to issue amnesty to them would become a vital one.

In answering this question the first requisite, under ordinary circumstances, would be to discover just what the term, "amnesty", means. This is a difficult task, for even the authorities differ on the precise line between pardon on the one hand, and amnesty on the other.[2] Elliott,[3] in differentiating between the two terms, is inconsistent himself. He says that the courts have refused to isolate pardon from amnesty, and yet a few paragraphs farther on he states: "To be sure, American courts recognize a distinction between the two . . ." To prove his first assertion he

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*Department of History and Political Science, Susquehanna University.

[1] 2 Encyclopaedia of the Social Sciences, Edited by E. R. A. Seligman and Alvin Johnson, (N. Y., 1930) pp. 36-39.

[2] The definitions in Baldwin Century Edition of Bouvier's Law Dictionary, in the Americana, and in the Britannica, are somewhat indefinite in distinguishing between the two.

[3] *Op. cit. supra* note 1.

cites *Brown v. Walker,*[4] which declares, "The distinction between amnesty and pardon is of no practical importance". Elliott also cites *Knote v. U.S.,*[5] which says the difference is merely philological: "All the benefits which can result from both pardon and amnesty, would equally have accrued . . . if the term 'pardon' alone had been used in the Proclamation of the President".[6] But the Court's dictum simply does not accord with the procedure that was worked out during reconstruction, when pardon and amnesty were not alike at all. There is a vast difference between what the Court, after reconstruction was over, said should be true, and what actually happened during reconstruction.

It seems to the present writer that if a study is made of the reconstruction era these inconsistencies and confusions disappear. For, while radical politicians may not have evolved definitions of pardon and amnesty from the authoritative sources, they did produce a practical differentiation which, having become the accepted theory during reconstruction, must now be taken as precedent in the United States at least. What was the practical distinction which radicals educed, merely because the party purpose demanded the creation of some kind of formula which would justify their acts?

In the first place, pardon is an executive function which is limited by the Constitution to the President. It may be used to save a common criminal, like a counterfeiter, from all or part of the punishment imposed by a court after conviction. Or it may free a group of political criminals (like rebels or insurrectionists) from the possibility of future judicial punishment. This is done by proclamation.[7] Offered to groups of rebels or insurrectionists, it restores their civil rights (owning property, for instance), but does not reinstate their political privileges (like voting and office holding).

Amnesty, on the other hand, is a legislative function which Congress was strong enough to arrogate to itself during reconstruction. The Constitution does not mention the term. It does not apply to common criminals but to political criminals, usually in groups, although not always. After their civil rights have been returned to them by a Presidential pardon, their political privileges may be restored to them by a Congressional amnesty, and by that alone.

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[4]161 U. S. 591, 16 Sup. Ct. 644, 40 L. ed. 819 (1896).

[5]95 U. S. 149, 152, 153, 24 L. ed. 442 (1877).

[6]*Id.* This case arose out of a decision of the Court on Claims in regard to the effects of Johnson's proclamation of Dec. 25, 1868 upon property confiscated under the act of July 17, 1862. Edward McPherson, A Hand-Book of Politics for 1876 (1876) pp. 87-88.

[7]President George Washington pardoned the whisky rebels by proclamation in 1795.

The fundamental difference between the two powers is that, in cases dealing with rebellion and treason, amnesty enfranchises while pardon does not.[8] To comprehend how radical statesmen arrived at this neat conclusion, some facts regarding the history of the reconstruction controversy are necessary.

II

Although there had been instances of Presidential pardons to rebels and insurrectionists before the Civil War, it was during and after this conflict that the problem became an acute, that is to say, a political one. The reason was that there developed a disagreement between President Lincoln and Congressional radicals over the way in which the southern states should be restored to the union. Congress, in the confiscation[9] law of July 17, 1862 had granted to the President the right to "pardon and amnesty" rebels at will. Some questions arose, at the time, as to whether Congress could grant to the Chief Executive the power of pardon, a power which he already had by constitutional authority, but it was not until after the war that this problem became a real bone of contention between Congress and the President. Lincoln made a few objections to other clauses in the bill, but seemed to have none against section thirteen which gave him power of pardon and amnesty.[10] On December 8, 1863 the President issued his famous one-tenth plan which offered (so far as the Executive could) to recognize new state governments provided ten per cent of the voters as of the election of 1860 took the oath of amnesty which he included in his proclamation. It later became a much debated question whether Lincoln issued this offer on the basis of his constitutional power of pardon, or on the basis of the right of pardon and amnesty as granted to him by Congress in the law of July 17, 1862. Some authorities say the first; others say the second.[11] The truth is that he referred to both grants of power[12]—a fact that does not help much in solving the problem. At various times, during the rest of the war, radical statesmen said that

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[8]The court in its disquisitions on the meaning of pardon and amnesty seems to have veered away from any definite mention of the restoration of the franchise through a pardon, although such restoration might be inferred. In a note to Armstrong's Foundry v. United States, 73 U. S. 766, 18 L. ed. 882 (1861), the effects of pardon are listed as enunciated in a long list of cases. The only reference mentioning the franchise directly is 9 Op. Att'y-Gen. 48, which said that a pardon restored a citizen who had been disfranchised for crime. But this was an opinion, not a Supreme Court decision.

[9]12 Stat. pp. 589-627 (1862).

[10]He said that the section was "something better than unobjectionable." CONGRESSIONAL GLOBE, July 17, 1862, p. 3406.

[11]For instance, RICKLEN, RECONSTRUCTION IN LOUISIANA (Baltimore, 1910) p. 151, says it was issued on the basis of the constitutional grant of power to pardon and reprieve. MCCARTHY, LINCOLN'S PLAN OF RECONSTRUCTION (New York, 1901) p. 24, declares it was done by virtue of the law of July 17, 1862.

[12]6 RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 (Washington, 1986) pp. 213-215.

the President did not have amnestying power,[13] and the Wade-Davis bill[14] was passed by Congress upon this theory. Congress refused to admit members from the state governments that Lincoln had restored, and in so doing seemed to be repudiating the power of amnesty it had already granted to the President.

The problem became of keen party interest when President Johnson proceeded to follow Lincoln's lenient policy of restoration by issuing several proclamations (the first on May 29, 1865)[15] offering amnesty to thousands of rebels—the great ones applying to him in person, the lesser ones merely appearing before the proper court official. On the basis of this kind of clemency, Johnson restored the southern states by allowing pardoned Confederates to vote, to elect constitutional conventions, to form state governments, and to send senators and representatives to the session of Congress which opened in December, 1865.

By that time the radicals were aroused. They perceived that Presidential pardon and amnesty might place the government in the hands of northern copperheads and pardoned rebels from the south.[16] After refusing to admit the members from the Presidentially reconstructed states, the radicals hurried frantically to concoct some kind of formula which would nullify Johnson's claim to the power of amnesty (that is, to enfranchise). Dozens of speeches, which declared the President was overstepping his powers in amnestying, could be cited, but the radicals were tied by a law which Congress itself had passed. That was the confiscation act which had given to the President the power to pardon and to amnesty. It became clear that this grant must be negatived. The repeal[17] went through on January 7, 1867, and yet the President continued to amnesty, not only by proclamation to groups, but also by releases to individuals.[18] After the military laws of March, 1867 (which disfranchised thousands at the order of Congress), many southerners said that, having been pardoned, they could not be deprived of the privilege of voting and officeholding. Every move to test the constitutionality of the laws was

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[13]For example, Congressman Nehemiah Perry of New Jersey, Globe, May 3, 1864, pp. 2071-74.

[14]Wade-Davis Bill.

[15]7 RICHARDSON, *op. cit. supra* note 12, pp. 310-312. For the complete story, see *Dorris, Pardoning the Leaders of the Confederacy,* XV MISS. VALLEY HIS. REV. (1928) 3-22.

[16]One of the charges brought by Ashley against the President in his resolutions of impeachment on Jan. 7, 1867, was the corrupt use of the pardoning power. MCPHERSON, A HAND-BOOK OF POLITICS FOR 1868 (Washington, 1868) p. 188.

[17]Globe (39 Cong. 2 Sess.) p. 180.

[18]Democrats, conservatives, and southerners argued that the repeal was useless. The New York World, Jan. 5, 1867, said that "in point of law, it will make no difference." The confiscation act, it continued, conferred no power on the President which he did not have and the repeal took none away. It was a move to catch the President in an impeachable offense. The New York Herald, Jan. 6, 1867, thought likewise.

evaded by the Supreme Court.[19] When registration of those who could take the proper oath proceeded under the reconstruction laws, hundreds of pardoned rebels demanded the right of registering on the basis of their pardons. They were always refused.[20] To make certainty doubly certain, Congress, in the third reconstruction act[21] of July 19, 1867, inserted a clause expressly stating that a pardon did not enfranchise.

The crisis arrived in September, 1867 when Johnson played his last card, namely, a proclamation which pardoned all remaining rebels except about 300. His conservative friends said that he intended to use the army to reopen the registration books and to force the insertion of pardoned southerners therein.[22] In fact he received many appeals calling upon him so to do.[23] Radicals prepared for an armed clash if the President should use force to justify his contention that a pardon enfranchised the recipient. Johnson's organ, the Washington *National Intelligencer,* declared that the President had no idea of using force, but was trying to get the case before the courts.[24] Many rebels, upon being refused the privilege

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[19]The Supreme Court had fomented untold radical wrath in its 5-4 decision in *Ex parte* Garland, 4 Wall. 333, 339 (U. S. 1867) in which it had nullified test-oaths for lawyers. One of its chief arguments was that Garland had received a Presidential pardon. The Court said further, "This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction . . . a pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full it releases the punishment and blots out of existence his guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense . . . and restores him to all his civil rights. It makes him as it were a new man, and gives him a new credit and capacity. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency." The angry radicals construed this decision narrowly by saying it referred only to civil rights, such as practicing law without having to take an oath of loyalty, and not to political privileges, such as voting and officeholding. In their defense it must be said that the Court mentioned only civil rights. The radicals always differentiated between civil rights and political privileges. See Russ, *The Lawyer's Test Oath during Reconstruction* (1937) 10 Miss. L. J. 154.

[20]See for instance, Ass't. Adjutant-Gen. S. T. Chalfin to W. G. Chase, June 12, 1867, in which he says, "I am directed by the Major General Commanding to say that having received a pardon does not affect a person's status." Letter Book, First Military District, I, 247. Also, Acting Assistant Adjutant-General William Ennis to C. K. Mallory of Hampton, Va., who had appealed against the board of registration which had refused to register him even though he presented his pardon. *Ibid.* p. 401. Finally, see a decision, *ibid.* p. 415, which read, ". . . while the President's pardon restores civil, it does not restore political rights." The records of the five military districts are housed in the National Archives, Washington, D. C.

[21]Third Reconstruction Act.

[22]For example, Boston Post, Sept. 30, 1867; Richmond Enquirer and Examiner, Sept. 17, 1867; Cincinnati Enquirer, Sept. 20, 1867; and Vicksburg Herald, Sept. 11 and 22, 1867.

[23]James Lyons of Richmond pleaded as follows, ". . . proclaim the law by which your pardon restores to the pardoned, all the rights and franchises of which by unconstitutional laws they were deprived, and among them the right of Suffrage." Andrew Johnson Papers, CXXII, 17445, Library of Congress.

[24]Sept. 11, 12, 1867.

of registering, did sue the registrars in the courts.[25] It was during the fall of 1867, therefore, that the precedent was being finally set and when much of the discussion regarding the difference between pardon and amnesty took place. With this historical background, an analysis of the problem is now possible.

III

Both radicals and conservatives agreed that pardon rested with the President by constitutional authority;[26] they disagreed upon whether pardon included amnesty and upon whether pardon restored both civil and political rights. Radical theory demanded that it restores only civil rights, although Congressman John A. Bingham of Ohio, who was somewhat of a student of constitutional law, had said, regarding the civil rights bill, that political and civil rights, according to Blackstone, were synonymous.[27] But such a doctrine was heresy in the eyes of radicals, for, if a pardon restored the political rights to hold office and to vote, radical control in the country would be endangered. As a matter of fact, radical comment always took the slant that the Presidential pardon did not enfranchise. The Albany *Evening Journal* said the President could not grant amnesty (that is, could not enfranchise) because he had no power to pardon before conviction and because he could not pardon communities as a mass.[28] Similarly the New Orleans *Tribune*: "The President can pardon rebels, but he cannot confer the right of suffrage on them".[29] An unsigned article in the *Atlantic Monthly* called the attempt to enfranchise secessionists "The Conspiracy at Washington"; and argued that there was a difference between

> ". . . the abuse of this power to pardon criminals after conviction, and the assumption of power to restore to whole classes of traitors and public enemies their forfeited rights of citizenship. By the pardon of murderers and counterfeiters, the President cannot much increase the number of his political supporters; by the pardon of traitors and public enemies, he may build up a party to

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[25]For instance, Gen. John D. Imboden of Virginia, Chicago Times, Oct. 20, 1867; and Judge Rice of Montgomery, Ala., Augusta, Ga., Constitutionalist, Sept. 26, 1867.

[26]Even Senator Charles Sumner admitted, "Congress, I know can not control the pardoning power; but it may express its opinion with regard to it; it may express its desire." Globe, July 3, 1867, p. 467.

[27]Quoted by WILSON, HISTORY OF THE RECONSTRUCTION MEASURES OF THE THIRTY-NINTH AND FORTIETH CONGRESS. 1865-68. (Hartford, 1868) p. 136.

[28]Clipped by Charleston Courier, Sept. 14, 1867. It is not difficult to see why the radicals maintained the point that pardon could not be applied until after conviction. If they made good this interpretation, they need fear little from Presidential activity in pardoning, even granting that it enfranchised, because to convict thousands of rebels individually would be humanly impossible. And how get a jury in the South? The radical attitude had the backing of John Marshall, who, in Wilson V. United States, 7 PET. 150, 160 (U. S. 1833), said that a pardon was the "private, though official act of the executive magistrate, delivered to the *individual* for whose benefit it is intended." (italics not in the original.)

[29]Clipped by the New Orleans Times, Sept. 11, 1867.

> support him in his struggle against the legislative department of the government . . . everybody knows he pardons traitors and public enemies in order to gain their influence and votes. A public enemy himself, and leagued with public enemies, he has the impudence to claim that he is constitutionally capable of perverting his power to pardon into a power to gain political support in his schemes against the loyal nation."[30]

This statement, probably by Lowell, the editor, shows clearly the party purpose of the radicals in refusing to admit the President's claim to the power of amnesty.

So also, Horace Greeley of the New York *Tribune,* while in favor of his pet scheme of impartial suffrage for both races, criticized the proclamation because he believed pardon and amnesty were not the same. Pardon, said he, was an act of grace exempting the applicant from penalties for a crime, while amnesty was the act of the sovereign power in effacing a crime entirely: "Amnesty is abolition of the offense. Pardon is remission of the penalty. The sovereign power of this nation is not the President but the people. The representative of the people is not Andrew Johnson, but the National Congress".[31]

The conservative and Democratic editors took, largely, the opposite view. The New York *World* fought the New York *Times*[32] and *Tribune,* both of which believed the President did not have amnestying power. The *World* said that the recent repeal of the Presidential amnestying power was "of no consequence except as signifying the will of Congress that he (Johnson) shall not exercise one of his constitutional prerogatives. But what right has Congress to say that the President shall *not* do, what the Constitution says he *may* do?"[33] It added that Lincoln had threatened to veto the confiscation act, one of the reasons being that it presumed to give him pardoning power which he already had; and that he had issued his proclamation of December 8, 1863 on the basis of his constitutional

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[30]20 Atlantic Monthly (1867) 633.

[31]New York Tribune, Sept. 5, 1867. The Louisville Journal, Sept. 11, 1867, defined the disputed terms as follows, "Pardon may be granted either before or after conviction. Pardon after conviction is pardon proper, and pardon before is amnesty. This is all the real difference that there is between them."

[32]For example, on Sept. 9, 1867, the Times in a blazing editorial said that the Constitution, no matter how elastically interpreted, did not justify enfranchisement by Presidential fiat because the "common-sense version of the constitutional provision limits it to individual cases . . . it is a deliberate defiance of Congress and its authority, a repudiation of its enacted laws, and an assertion of the President's determination to take the work of reconstruction into his own hands . . . What more flagrant form could Executive usurpation take short of dictatorship?" Exactly opposite was the attitude of the Cincinnati Enquirer of Sept. 10, 1867, "The President's power in this respect is more plenary than that of Congress, and his Amnesty Proclamation will compel the Registrars to register tens of thousands of Southern citizens, that the Reconstruction Laws of Congress say shall not be voters."

[33]Sept. 10, 1867.

prerogative and not by virtue of the grant made him by Congress.[34] The conservative Charleston *Mercury* placed the radical position succinctly as follows: "The Radicals contend, that although the President can pardon *individuals,* he cannot pardon *numbers* of them in classes. The distinction is without force; because the *numbers,* consist of the *individuals;* and if you can pardon *one man* for an act of insurrection in resisting a government either by counsels or by force of arms,—you may pardon at the some time, *all* who were engaged with him in the same resistance".[35] The dignified New Orleans *Crescent* argued:

> "It is clear that, if the President possesses authority to exempt any class of offenders from penalty—and his plenary pardoning power under the Constitution is not denied—he possesses authority to exempt from disfranchisement, if that be a penalty, those classes whom Congress declares to have forfeited their right to vote and to hold office by the offense of rebellion against the United States. But it is also clear that the President cannot execute all the provisions of the reconstruction law without nullifying one of the important significations of his pardon to late rebels, and that which he seems in his second amnesty proclamation, to be anxious to make prominent. Radical journals, in anticipation of this last document, have been disputing the President's right to override Congressional disfranchisement, on account of rebellion, by an executive pardon. For practical purposes it is useless to discuss the question as one of right. The struggle between Congress and the President, on this as on every other question, must be determined by preponderance of moral and physical force."[36]

Among other comments that might be made about the above statement by the *Crescent* the following should be noted: (1) the suggestion that the President's executive pardon might be used to nullify the act of Congress in disfranchising certain persons is reminiscent of the attempt of Charles II of England, by means of his Declaration of Indulgence in 1672, to suspend an act of Parliament which placed certain religious tests upon Catholics and others; and (2) if the practical wisdom, which characterized the analysis by the *Crescent,* had been true also of other conservatives, much bitterness and heartburning would have been obviated, North and South. The St. Louis *Missouri Republican,* an administration paper, was almost as practical when it concluded that the recent proclamation was not amnesty, but pardon; that it had nothing to do with suffrage, for that was a state matter; and that if the pardoned individual had voted

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[34]This is not accurate. President Lincoln referred to both the Constitution and to the law of July 17, 1862 in his proclamation; and he did not intend to veto the confiscation act because of the grant of amnesty, but because of a technicality which Congress removed. He then approved the law.

[35]Sept. 11, 1867. See also Sept. 17 and 25, 1867.

[36]Sept. 10, 1867.

before the war he ought to be able to vote now because a pardon did not change his status in that respect.[37] The Columbus (Ga.) *Enquirer* was also sensible:

> "An impression has somehow been produced that those pardoned . . . are thereby enfranchised though proscribed by the acts of Congress. This, as we have said, might be the *legal* effect—indeed it may be questioned whether Congress has the Constitutional right to disfranchise any man until convicted of crime, and then only as an elector of Federal offices. But the work of reconstruction has been taken from the hands of the President. Congress, in selecting persons for disfranchisement paid no regard to the exceptions made by the President in his former proclamation of pardon; and in its very latest Reconstruction act it expressly provided that no amnesty of the President should affect in any manner the qualifications of voters proscribed by that act."[38]

From the standpoint of cold-blooded realism, little more could be said on the subject than what the *Enquirer* had said: The President might claim that his pardon enfranchised; the Supreme Court might, indirectly, as in the Garland decision, support him; but Congress had the power, and Congress had legislated otherwise. That was that.

IV

Granted that Congress had budgeoned the President into accepting its way, what was the law on the question? Constitutionally, who was correct, the President or Congress? It is hard to answer with certainty, for some of the best minds of the times were on both sides of the controversy. The radicals quoted Bouvier's *Law Dictionary* to prove that amnesty was legislative, while the Chicago *Times* quoted the same source to prove that amnesty was executive.[39]

If the problem be taken to its source, the Constitution, there is little more certainty, because amnesty *per se* is not mentioned. Defenders of the executive prerogative referred for support to that document, and yet it merely states that the President is empowered "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment".[40] Inasmuch as reprieves and impeachment are not in question, does the grant of "pardon" mean amnesty also? Is amnesty something the Fathers never thought of? Does the President have amnestying power because he has a related one, that of pardoning? Senator George F. Edmunds in his report of February 17, 1869, denouncing Johnson for issuing his final pardon of December 25, 1868 (which freed the rest of

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[37]Sept. 10, 1867.
[38]Clipped by the Atlanta Daily Intelligencer, Sept. 12, 1867.
[39]Sept. 4, 1867.
[40]U. S. Const. Art. II, § 2.

the rebels), said that the Fathers of the Constitution knew all these terms, and so deliberately omitted the grant of amnesty from those powers given to the Presidency. He quoted Blackstone and Bouvier to show that a pardon "did not look backward, but only forward; it did not restore what was lost, but only remitted what was yet to be suffered." He showed that the English king did not have the power to pardon generally—that is, to amnesty—because from 1535 on, this right had been exercised by Parliament. Amnesty, he concluded, was an act of oblivion for past offenses granted by the sovereign power to "whole classes of offenders"; and that "sovereign power" in the United States was Congress and not the President.[41] Greeley had made the same point as early as September, 1867.

What had the President to say? In his defense submitted to Congress at the request of the Senate on January 5, 1869 he justified his action on the basis of precedents set in the past. He quoted Washington's proclamation of July 10, 1795 to the whisky rebels, Adam's proclamation to the Pennsylvania insurgents on May 21, 1800, Madison to the Louisiana freebooters on February 6, 1815, Lincoln on December 8, 1863 and on March 26, 1864, and his own proclamations of May 29, 1865, September 7, 1867, and July 4, 1868.[42] With all these precedents Edmunds, for the Senate Committee, disagreed, saying they were not valid; that Lincoln's right of amnesty had been granted by Congress on July 17, 1862 which had then taken it away on January 7, 1867.

Omitting the precedents set by his own proclamations (to quote which was somewhat disingenuous on Johnson's part), one must look to the earlier ones, especially that of Washington, for precedent. For, as the Atlanta *Daily Intelligencer* said, Washington had pardoned the whisky rebels. "Was Washington a usurper?"[43] But had these earlier proclamations been amnesties in the sense of the term used by the radicals, or were they merely pardons? Did they restore the franchise? Washington offered "a general pardon" to the whisky rebels.[44] Adams granted "a full, free, and absolute pardon" to the Pennsylvania insurrectionists.[45] Madison published "a free and full pardon" to the roughs on Barrataria Island, provided they swore that they had helped defend New Orleans during the recent British invasion.[46] Whether these early pardons restored full political privileges is uncertain, although, inasmuch as at that time suffrage was almost entirely controlled by the states, it is hard to see

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[41]Sen. Rep. 239, 40 Cong., 3d Sess.
[42]Sen. Ex. Doc. 239, 40 Cong., 3d Sess.
[43]Sept. 17, 1867.
[44]1 RICHARDSON *op. cit. supra* note 12, p. 181.
[45]*Id.* at 303-304.
[46]*Id.* at 558-560.

how they had anything to do with the vote or with officeholding.[47] When Washington pardoned the whisky rebels, they were freed from punishment by the United States. Pennsylvania had the final disposition of the question whether they could vote or hold office. Undoubtedly the state permitted them to exercise their political privileges, but the decision rested with the state and not with the federal government.[48] Then too there was no party situation as in 1867 to question such a pardoned individual's desire to vote or hold office. At all events, the precedents are shadowy and inconclusive.

Although the Constitution and earlier proclamations are in this connection rather indecisive, some information may possibly be gained from other early sources. Madison's *Journal* shows that, when pardon was being discussed in the Constitutional Convention, Randolph wished to give to the President no authority to pardon treason whatever because he thought it would provide the Executive with too much influence; and besides, the President himself might be guilty. Wilson wanted to make pardon an executive function; Morris wanted to make it legislative. King thought a legislature was too fickle, hence unsuited to the task. Madison admitted the weakness of legislatures, but opposed giving the power of pardoning treason to the President, preferring to grant it to both the Senate and to the President. But Mason and Randolph thought the Senate had received too much authority already. In the end the Chief Magistrate was empowered to reprieve and pardon.[49] Obviously, this does not help much because not a word was said of amnesty.[50]

Hamilton drew the assignment of discussing the pardoning power in the *Federalist* and did not add much to Madison's statement. He repeated that there had been fear of granting to an unstable legislature such a duty in times of passion when one man's mind was better than many. The best reason for lodging it with the President was that during a rebellion "a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth". Clearly a well-timed offer might not be possible when the question was thrown open for debate by many

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[47] 2 RICHARDSON, *op. cit. supra* note 12, at 38, says, "Certainly he (Johnson) had precedents for his action in the presidential amnesty proclamations by Washington, Adams and Lincoln." But did he?

[48] In this connection see the speech of Samuel Shellabarger of Ohio on the disfranchising section of the Fourteenth Amendment in which he tried to prove that the United States, by laws of March 26, 1790 and of April 14, 1802, had declared that any person disfranchised by a state would never be readmitted to United States citizenship without the consent of the proscribing state. The first mentioned law referred to Tories, who had been disfranchised by South Carolina in 1785; and the second to followers of Dan Shays, who had been disabled by Massachusetts in 1787. Globe, April 21, 1866, pp. 2102-07.

[49] MADISON, JOURNAL OF THE FEDERAL CONVENTION, edited by E. H. Scott (Chicago, 1893) p. 734.

[50] If amnesty referred to the franchise and if the franchise was a state matter, would there be any reason for the Fathers to mention it?

members. Hamilton says nothing of amnesty, unless that be included in the definition of pardon.[51]

V

Thus the question could hardly be settled by any reference to the Constitution or to past precedents unless the radicals were willing to agree that pardon and amnesty were the same thing—which they refused to do. The problem became a political one, tied up with the continued control of the radical party and with the attempt of the conservatives to gain office. If Johnson could amnesty and return the franchise to thousands of rebels, he might well secure enough votes to overturn the radicals, who feared they might lose the victory which had been so hard to win in the Civil War. Hence the radicals, to maintain their majority, perceived it was the better part of wisdom to interpret amnesty as one thing, pardon as another; and Johnson found it to his advantage to say that he had both and that they were one and the same thing. It happened, however, that those who supported the Presidential theory were in the minority; hence all the opinions which might support Johnson were uttered by those whose voices were merely an opposition group: they did not establish policy. Thus the minority of the reconstruction committee backed the Johnson attitude fully, but the committee minority had no power except that of protest:

> "The several proclamations of amnesty issued by Mr. Lincoln and his successor under the authority of Congress are also inconsistent with the idea that the parties included therein are not to be held, in the future, restored to all rights belonging to them as citizens of their respective States. A power to pardon is a power to restore the offender to the condition in which he was before the date of the offence pardoned . . .
>
> "It is now settled that a pardon removes not only the punishment, but *all* the legal disabilities consequent on the crime . . . The amnesties so declared would be but false pretences if they were, as now held, to leave the parties in the condition they would have been in if they had rejected them. Such a result, it is submitted, would be a foul blot on the good name of the nation."[52]

But the minority "submitted"; it did not set present policy. The majority of the committee said exactly the opposite. Each party took the position which seemed to promise for it the most advantage. The legislature of New Jersey, in withdrawing its assent to the Fourteenth Amendment, gave as one reason that "it lodges with the Legislative branch of the Government the power of pardon, which properly belongs, by our

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[51]Federalist Papers, No. 73.
[52]McPherson, Hand-Book for 1868, *op. cit. supra* note 16 at 100.

system, to the Executive".[53] But this was again on the minority side; and Congress refused either to listen to the states resolution of rejection or to allow it to appear on the pages of the *Globe* because the radicals said the legislature's action was "scandalous". When the Governor returned the Amendment to the state legislature, which rejected it again, both were acting out of partisanship rather than out of concern for the merits of the case.

When one turns to the statements of the majority group, he finds attitudes taken to bolster up the cause, rather than any facts to aid him in arriving at a clear conclusion. Thus, when the Chicago *Tribune* said that the President "may by his pardoning power restore offenders against the United States to natural and civil rights, *but not to political rights;* he has no power to re-invest them with political privileges",[54] it was again a partisan organ saying what would be of advantage to the party. The same partisanship is evident in a speech in the House by George S. Boutwell: "But while I occupy a place on this floor, *never,* with my consent, *shall the pardon of the President* be a certificate on which a felon enters into the sacred tribunals of the land, and assists in the administration of the laws".[55] Of the pamphlets issued at the time on one side or the other, the same can be said.[56]

The Presidential theory, much as it was defended and explained, never came into force, because it was not to the interest of the dominant radical group that it should. Hence all the radical southern elections, all the conventions, and all the constitutions, were based upon the theory that Congress alone could restore the franchise to rebels. Thus a committee in the Georgia radical constitutional convention of 1868 said: "Perhaps half of the members of this Convention, as well as that of 1865, are held by the United States to have been guilty of treason. It is true that they have been pardoned, but we greatly doubt if the pardon is at all necessary to make them eligible".[57] In short, the doctrine that Presidential pardon did not enfranchise became bone and blood of the new political system that grew out of the war—not so much because it had already been accepted as legal, but because the radicals saw the advantage to be gained by making it so. If it had been to their interest to decree otherwise, or if the Johnson group had secured control, the opposite would

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[53]The American Annual Cyclopaedia and Register of Important Events (New York, 1868) pp. 540-41; and Fredericksburg (Va.) News, Feb. 27, 1868.

[54]May 20, 1867.

[55]Quoted by Richmond Enquirer, Jan. 25, 1867.

[56]One written by "Amecius" on The Rebel States, The President and Congress, Reconstruction and the Executive Power of Pardon concluded that, "A pardon by the President before conviction, unless in execution of a law of Congress, is unauthorized by the Constitution, and is therefore null and void." The pamplet was published in New York in 1866. There is a copy in the Congressional Library.

[57]Journal of the Proceedings of the Constitutional Convention of the People of Georgia (Augusta, Ga. 1868) pp. 274-75.

have been true, and the Presidential claim to the power of amnestying (enfranchising) would have been maintained. After all, however, it must be said that the question was a twilight one and neither contestant had a sure case—a case which could be proved either by the Constitution or by precedent. The Fathers, Senator Edmunds to the contrary notwithstanding, seem never to have thought of amnesty, or if they did, they embalmed it in pardon, which opened the term wide to any kind of interpretation, depending upon party advantage. Radical party advantage demanded the radical theory. The action of Congress took amnesty out of the President's authority, and at least one of Johnson's party recognized the fact. Secretary of the Navy Gideon Welles, writing in his diary about the Presidential proclamation of September 7, 1867, accepted this restriction upon the Executive when he said, "The President has the power by the Constitution to grant pardons, but not amnesty". In England, he continued, Parliament had the power of amnesty; lawyers in Congress, imitating Parliament, arrogated to Congress the same prerogative. Welles thus unwillingly admitted that the President had lost whatever rights to amnesty he may have had; but the Secretary added that amnesty ought not to enter the American system of government, because the United States had neither attainders nor successions to the crown.[58]

VI

Congress had imbedded the radical theory into the law by a series of statutes, as follows: (1) the mistaken grant of pardon and amnesty to the President in the confiscation act of July 17, 1862 had been repealed in January, 1867; (2) in the two military reconstruction laws of March, 1867 Congress had itself disfranchised thousands of rebels; (3) in the third military reconstruction law of July 19, 1867 Congress had specifically stated that a pardon did not enfranchise. All these measures had been possible because the radicals had the necessary two-thirds to override Johnson's vetoes.

But the radicals were not willing to subside with the passage of mere legislation. Lest a future President might try, as Johnson had, to use his pardon to restore those who had been disfranchised, they took one more step: they implanted part of the radical theory into the Constitution. In the third section of the Fourteenth Amendment, all those who, having taken an oath as officeholders to the United States, might later enter a rebellion, were disfranchised from holding state or federal office.[59] Such disabled persons could be restored only by means of a two-thirds vote of Congress. Thus did the legislative department arrogate to itself the power to amnesty; and not a word was said about the President.

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[58]3 Gideon Welles Diary, edited by John T. Morse (1911) 198.
[59]Nothing was said about voting.

The third section not only decreased executive power, but state power as well. Those who, having taken an oath as officeholders, might later enter a rebellion, were disfranchised from state office as well as from federal. To that extent the people of a state were estopped from choosing whom they wished as officers until two-thirds of Congress acted.

Thus, by law and by amendment, which indicated the rising domination of Congress at the expense of the state and of the Presidency, significant changes had been effected. This serious reduction in the prestige and authority of the President was, of course, unfortunate for the Presidency and for the thousands of hapless individuals who had been taught since December 8, 1863 to look to the Executive for restoration of their status as voters and officeholders. During the reconstruction period the office of Chief Magistrate suffered numerous restrictions in power,[60] of which the limitation upon the pardon is not the least important. This reduction was a piece with the other acts of the radical party which were dedicated to the purpose of deflating the President, in the words of the Boston *Traveller,* "to the feebleness of a Venetian Doge",[61] and even of changing the fundamental character of the federal government. Johnson's lament in his farewell address on March 4, 1869 is a partisan and yet an eloquent commentary upon what had been achieved by the radicals:

> "They have robbed the Executive of the prerogative of pardon (amnesty), rendered null and void acts of clemency granted to thousands of persons under the provisions of the Constitution, and committed gross usurpation by legislative attempts to exercise this power in favor of party adherents."[62]

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[60]It is hardly necessary to say that this was a temporary development and that soon the Presidency was overshadowing Congress. The states, however, never regained their prewar power.

[61]Jan. 8, 1867.

[62]THE AMERICAN ANNUAL CYCLOPAEDIA (New York, 1869) *op. cit. supra* note 53 at 591. The reader is warned that, so far as the writer knows, there is not an authority in the land who would agree with the gravamen of this paper, namely, that amnesty alone enfranchises and that the President has lost, if he ever had, the power of amnesty. For instance, Orth and Cushman, AMERICAN NATIONAL GOVERNMENT (New York, 1943) pp. 295, say that both President and Congress may amnesty; so also, Ogg and Ray, INTRODUCTION TO AMERICAN GOVERNMENT, (7TH ed. New York, 1942) p. 368. The writer suggests that they study the reconstruction period.

WHAT IS THE LAWYER DOING IN THIS WAR?

*Forrest G. Cooper**

Every member of the legal profession should be proud of the contribution lawyers are making in this war. Over one-fourth of the licensed attorneys of Mississippi are now serving their country in uniform, and the lawyers who are not in uniform are likewise serving on the home front. Long before Pearl Harbor the Mississippi State Bar had a National Defense Committee charged with the duty of assisting men in uniform and their families in all legal problems growing out of the transition from civilian status to training in arms. Likewise, this National Defense Committee was charged with the duty of assisting our people in understanding better the perils, dangers and problems then confronting America, and the need of adequate preparation. The writer of this article was the chairman of that committee during its two years of existence. There followed the Committee on War Work, which performs only one phase of services the Mississippi State Bar is now giving.

The purpose of this article is to acquaint the Bar and the other readers of the Journal with the program of the Committee on War Work.

The prime function of our committee grows out of the conviction that a soldier who is worried by legal, property or domestic problems at home cannot make as good a soldier as one whose mind is at ease. To this end, the Mississippi State Bar has dedicated itself to render legal aid and assistance to the many scores of thousands of young men from Mississippi who have joined our military and naval forces, and their families. This aid is also given to the many scores of thousands of men of the armed forces who are temporarily stationed in Mississippi.

If a soldier is worried about problems of insurance, taxes, installment payments, threatened foreclosures, possible litigation, he can secure from the Committee on War Work free advice and legal assistance. Powers of Attorney and Wills are prepared free of charge in order that the soldier may be satisfied that his property will be looked after back home while in service, and will be disposed of, as he wishes, if he fails to return.

This does not mean, of course, that the Bar is under obligation to render every kind of professional service to men solely on the ground that they are in uniform. If a soldier has litigation which has no connection, direct or indirect, with his military service or his transition from civilian life to the armed forces, he is expected to pay a reasonable sum for such services. Lawyers have always given freely of their time and skill to

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*Indianola, Miss. B.S. 1912, Univ. of Miss. Member of Miss. State Bar, Am. Bar Ass'n., Miss. Bd. of Trustees of Institutions of Higher Learning.

needy persons without charge, and they will continue to do so. Any soldier in that category can still get any kind of legal service without charge, but if his financial condition is such that he is reasonably able to pay for his services and the type of service needed has no connection with his military experience, the Bar feels that he is not entitled to the gratuitous service of a lawyer any more than he is that of a merchant or doctor. But whenever a charge is made, the members of the Bar are making those charges most reasonable and are giving the soldier the benefit of the doubt as to his ability to pay. The committee gives free advice in all matters of divorce, alimony and domestic difficulties, but if a divorce is sought, either by the man in uniform or his wife, a reasonable fee is charged, except in charity cases referred to above. The wife is entitled to the same free advice and assistance as her husband in uniform. Let me again emphasize that the Bar is rendering free legal service in every instance, litigation or otherwise, where the service sought has any connection with his transition from civilian life to the uniform.

The Mississippi Bar has authorized Ross R. Barnett, its President, to appoint a Committee on War Work to carry into effect these types of service. This general committee, a list of whom is given below, has been functioning for two or three years. It has asked for volunteers among the lawyers of the State in the various counties to perform these services. They likewise are listed in the Appendix.

This work is under the general supervision of the American Bar Association and is according to a plan worked out in cooperation with the War and Navy Department. Our Army and Navy officials have named a group of Legal Assistance Officers who are the contact officers between the soldier and civilian lawyer. When the soldier is in need of the services of an attorney, he goes to the designated Legal Assistance Officer at his camp. He is there referred to the civilian attorney for advice and assistance. The Legal Assistance Officers at the military camps in Mississippi are given below, as are the Legal Assistance Officers of the Navy Establishments in Mississippi.

Appendix

1. Committee on War Work:

Forrest G. Cooper, Indianola, Chairman; W. H. Watkins, Jackson; W. E. Morse, Jackson; J. E. Caradine, West Point; Carey Stovall, Corinth; Gerard H. Brandon, Natchez; T. H. Byrd, Lucedale; T. W. Davis, Purvis; H. D. Young, New Augusta.

2. Volunteer lawyers are:

W. C. Adams, Corinth; F. A. Anderson, Jr., Gloster; Bidwell Adams, Gulfport; J. M. Alford, Tylertown; B. B. Allen, Indianola.

R. O. Bickerstaff, Gulfport; J. W. Backstrom, Leakesville; Tom J. Bailey, Meridian; E. L. Brunini, Vicksburg; Tom J. Barnett, Carthage; J. W. Bell, Jr., Tunica; Gerard H. Brandon, Natchez; Allen Bridgeforth, Yazoo City; Maxwell Bramlette, Woodville; Mack L. Boyken, Vaiden; Joseph E. Brown, Natchez; J. J. Breland, Sumner; John Sharp Butler, Quitman; A. Q. Broadus, Purvis; S. B. Berry, Hattiesburg; Harry M. Bryan, Jackson; L. W. Brown, Starkville; E. H. Britton, Macon.

A. M. Carothers, Grenada; J. H. Caldwell, Charleston; T. H. Campbell, Jr., Yazoo City; Ben F. Cameron, Meridian; L. K. Carlton, New Albany; S. P. Clayton, Tupelo; T. A. Clark, Iuka; J. W. Conger, Winona; C. F. Cowart, Meadville; John W. Crisler, Clarksdale; A. W. Cooper, Forest; James T. Crawley, Kosciusko; Alexander Currie, Hattiesburg; George W. Currie, Hattiesburg; Homer Currie, Raleigh; R. L. Corban, Fayette; R. C. Cowan, Gulfport; G. B. Cousins, Jr., Biloxi; J. P. Coleman, Ackerman; Gerald Chatham, Hernando; Ellis B. Cooper, Laurel.

J. E. Davis, Hattiesburg; J. H. Daws, DeKalb; E. L. Dent, Collins; T. W. Davis, Jr., Purvis; T. Price Dale, Hattiesburg; J. T. Drake, Port Gibson.

F. W. Elmer, Jr., Biloxi; J. P. Edward, Mendenhall; Charles F. Engle, Natchez; J. E. Eudy, Eupora; A. K. Edwards, Mendenhall.

J. D. Finch, Iuka; John F. Frierson, Columbus.

Eugene Gerald, Leland; C. E. Gibson, Monticello; C. T. Gordon, Liberty; J. H. Graham, Meridian; Robert L. Genin, Bay St. Louis; W. A. Geisenberger, Natchez; W. J. Gex, Bay St. Louis; J. K. Gillis; Philadelphia; T. N. Gore, Marks; W. L. Guice, Biloxi.

Leon F. Hendrick, Jackson; T. C. Hannah, Hattiesburg; D. W. Holmes, Hattiesburg; G. M. Holmes, Aberdeen; G. W. Hosey, Laurel; J. G. Holmes, Yazoo City; Herbert Holmes, Senatobia; O. M. Hornsby, Natchez; H. P. Heidelberg, Pascagoula; Lee D. Hall, Columbia; Emmet Harty, Greenville; W. S. Henley, Hazelhurst; R. W. Heidelberg, Hattiesburg; John H. Holloman, Columbus; H. T. Holmes, Winona; Cowles Horton, Grenada; John Horan, Water Valley; G. B. Herring, Canton; D. W. Houston, Sr., Aberdeen; J. Knox Huff, Forest.

R. A. Jordan, Greenwood; H. G. Johnson, DeSoto Station, Memphis, Tenn.; John I. Joor, Rolling Fork; D. R. Johnson, Batesville; E. L. Joyner, Tupelo; Elbert Johnson, Indianola; Means Johnston, Greenwood.

William C. Keady, Greenville; T. C. Kimbrough, University; R. M. Kelly, Vicksburg; John M. Kuykendall, Charleston.

E. L. Lamar, Calhoun City; W. H. Livingston, Prentiss; F. E. Leach, Carthage; E. M. Livingston, Louisville; P. P. Lindholm, Lexington; B. H. Loving, West Point; W. A. Lomax, Grenada; Semmes Luckett, Clarksdale; W. B. Lucas, Macon; O. C. Luper, Prentiss.

L. W. Maples, Gulfport; W. G. McLain, McComb; James McClure, Sardis; Ben H. McFarland, Aberdeen; W. E. McIntyre, Brandon; Myron S. McNeil, Hazelhurst; J. T. McCully, DeKalb; Dick C. McCool, Canton; N. H. Malone, West Point; O. F. Moss, Lucedale; C. C. Miller, Meridian; S. C. Mims, Grenada; Henry Mounger, Columbia; W. E. Morse, Jackson; J. M. Morse, Poplarville; Augustin Magruder, Starkville; J. C. Murray, Brandon.

R. H. Nason, Belzoni; R. R. Norquist, Yazoo City; Roy P. Nobles, Laurel; Junior O'Mara, Jackson; Robert E. Nason, Ackerman.

H. Talbot Odom, Greenwood; Robert P. Phillips, Brookhaven; Thos. Fite Paine, Aberdeen; Kenneth G. Price, McComb; Zelma W. Price, Greenville; U. B. Parker, Wiggins; E. B. Patterson, Jackson; M. F. Pierce, Greenwood; L. P. Puryear, Senatobia.

J. A. Riddell, Meridian; Rupert Ringold, Winona; S. T. Roebuck, Newton; Vernon D. Rowe, Winona; Henry L. Rodgers, Louisville; D. T. Ruff, Lexington; W. W. Ramsey, Vicksburg.

J. C. Satterfield, Jackson; Dugas Shands, Cleveland; Ben Stevens, Hattiesburg; James B. Sykes, Mendenhall; Luther A. Smith, Hattiesburg; W. I. Stone, Coffeeville; W. W. Simmons, Cleveland; J. B. Saxon, Waynesboro; Phil Stone, Oxford; C. W. Sullivan, Hattiesburg; Walter Sillers, Rosedale.

Landman Teller, Vicksburg; J. D. Thames, Vicksburg; Earl T. Thomas, Indianola; O. B. Triplett, Jr., Forest; Clay B. Tucker, Woodville; R. S. Tullos, Raleigh; Wm. F. Taylor, Drew; R. W. Thompson, Jr., Gulfport; Louey V. Tullos, Mize.

Howard Westbrook, Meridian; Ben Wilkes, Greenville; B. F. Worsham, Corinth; Will E. Ward, Starkville; F. L. Wright, Rolling Fork; E. B. Williams, Poplarville; Hugh Wall, Brookhaven; W. S. Welch, Laurel; W. Calvin Wells, III, Jackson; D. H. Waits, Leland; B. M. Walker, Jr., Starkville; E. P. Windham, Mayersville; W. D. Womack, Belzoni; W. T. Wynn, Greenville; L. A. Whittington, Natchez; Gibson B. Witherspoon, Meridian; H. Vaughn Watkins, Jr., Jackson.

M. C. Young, Aberdeen.

3. Legal Assistance Officers at the military camps in Mississippi:

Lt. Robert C. Carson, Greenwood Army Air Field, Greenwood, Miss.; Lt. Robert B. McCullen, Laurel Army Air Field, Laurel, Miss.; Capt.

Richard B. Foster, AAF Eastern Technical Training Command, Keesler Field, Biloxi, Miss.; Lt. Thomas J. Wiltz, Army Air Base, Key Field, Meridian, Miss.; Lt. John M. Seal, Camp McCain, Miss.; Lt. Charles D. Rutta, Camp Shelby, Miss.; Lt. Ambrose Doskow, Greenville Army Flying School, Greenville, Miss.; Capt. Philip J. Reilly, Enlisted Branch #2 Army Administration School, Mississippi Southern College, Hattiesburg, Miss.; Capt. William R. Altom, Mississippi Ordnance Plant, Jackson, Miss.; Lt. Henry H. Rightor, Jr., Columbus Army Air Field, Columbus, Miss.; Lt. Frank Fisher, Jr., Army Air Base, Grenada, Miss.; Lt. Col. John E. Quinn, Army Air Forces Specialized Flying School, Jackson Army Air Base, Jackson, Miss.; Capt. Frank Watson, Chief L.A.O., Army Air Forces Technical Training Command, Gulfport, Miss.; Capt. Lawrence B. Parsons, Como Internment Camp, Como, Miss.; Capt. Harold R. Brophy, Camp Van Dorn, Miss.; Capt. Allen T. Akin, Gulf Ordnance Plant, Prairies, Miss.

4. Legal Assistance Officer of the Navy establishments in Mississippi:

Lt. (jg) R. B. Stover, D-V(S), (acting) Merchant Marine Cadet Basic School, Pass Christian, Miss.; Lieut. Comdr. James H. Graves, Jr., D-M, APA Ferry Crew #5, Pascagoula, Miss.; Lieut. (jg) W. G. McCullough, D-V(S), Armed Guard School, Gulfport, Miss.; Lieut. (jg) W. G. McCullough, D-V(S), U. S. Naval Advance Base Depot, Gulfport, Miss.; Lieut. (jg) Sanders A. Goodstein, SC-V(G), APA Ferry Crew #4, Pascagoula, Miss.; William J. O'Conner, Y1c, V-6, USNR, Navy V-12 Unit, Millsaps College, Jackson, Miss.; Lieut. A. K. Burt, Navy V-12 Unit, Mississippi College, Clinton, Miss.; Lieut. Frank S. Rook, D-V(S), USNR (Acting), Supervisor of Shipbuilding, Pascagoula, Miss.; Lee Ward CY, ABD Receiving Barracks, 98th Naval Construction Battalion. Bureau of Yards & Docks, Gulfport, Miss.

CONTINUANCES IN MISSISSIPPI

*Vardaman S. Dunn**

CONTINUANCE BECAUSE OF ABSENT WITNESSES OR DOCUMENTS

The subject includes a discussion of the rules and considerations governing the right of litigants to a continuance, because of absent witnesses or documentary evidence. Other closely related subjects are also treated, including application for continuance based upon the ground that the applicant has not been afforded a reasonable time to prepare his case for trial. The rules governing both civil and criminal cases being generally identical, decisions in both categories are cited throughout this article.

I. *In General*

On the one hand, it is the policy of the law that the parties to an action should have the benefit of the personal attendance of material witnesses whenever reasonably practicable, and this is especially true in criminal cases.[1] On the other hand, attempts to bring about delay, especially in criminal cases, solely for the purpose of frustrating, rather than securing, justice have been so frequent, that the application for continuance is now generally viewed with caution and some degree of suspicion. The result is the enforcement of very strict requirements in both civil and criminal cases.

Running throughout all the decisions is the prevalent idea that the trial court in passing upon applications for continuance is vested with large discretionary powers, and it is only in clear cases of abuse of that discretion that the appellate court will reverse. Therefore, it is said that no absolute rule can be laid down as to what matters will constitute good ground for a continuance in all cases.[2] But the various rules and formulas for determining the question are fairly well settled and understood. It is only in the application of the given facts in any particular case that difficulty arises.

The statute for civil cases[3] is merely declaratory of the common law, which was fairly well established in this state even before the first skeleton statute in 1857.[4] The court exercised an inherent power in this field quite independently of statute, and in fact many of the decisions

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*Member of Hinds County, Mississippi, Bar; LL.B. Univ. of Miss.

[1]Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846), "Very often . . . much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony."

[2]Williams v. State, 92 Miss. 70, 45 So. 146 (1907).

[3]Miss. Code Ann. (1930) § 576.

[4]See Strauss v. State, 58 Miss. 53 (1880) (common law requirements). The first statute appears in Miss. Code (1857) c. 61, art. 151, which simply requires the affidavit to state the facts to be proven by absent witness or documents. The cur-

rendered since the enactment of the statute in its present form fail to refer to it.

There are two statutes relating exclusively to criminal cases. The first is a special statute prescribing the time for applications in capital cases; it provides, in effect, that the application cannot be considered after the drawing of the special venire, except for causes arising afterwards, unless a good excuse be shown for not having made the application sooner.[5] The second is a general statute which applies in all criminal cases, but which is restricted to admissions by the statement of facts in the defendant's affidavit:[6]

> "In all cases of application for continuance, it shall be lawful for the state or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the same effect as if the absent witness or other evidence were present in court, and no more; but if compulsory process will probably obtain the attendance of the absent witness, and the defendant have not had opportunity of obtaining such process, the cause shall be continued, unless the defendant desire a trial."[7]

This provision, unlike the civil statute, is in derogation of the common law and is therefore strictly construed. The common law rule is to the effect that such admissions, over the defendant's objection, are improper in criminal trials, but that, once the admission is made, it amounts to an absolute admission of the truth of the facts set forth in the defendant's affidavit and not merely that the absent witness would testify to certain facts. This was considered as the only fair substitute for the personal attendance of the witness and the important superiority of his oral testimony.[8] The purpose of the statute was to change this rule of the common law, and its effect is limited to that purpose. It does not otherwise encroach upon or alter common law principles, and it does not come into view and cannot be considered unless the applicant first establishes that, except for the admission, he would be entitled to a continuance.[9]

The civil statute has been held inapplicable to criminal trials in order to avoid certain constitutional objections,[10] but going back to the common

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rent statute appeared for the first time in MISS. CODE (1906) § 784. Although, as observed in Gibson v. Carr, 91 Miss. 773, 45 So. 864 (1908), the present statute is much broader than the earlier ones, it has not greatly affected the policy of the law, if at all.

[5]MISS. CODE ANN. (1930) § 1263.

[6]MISS. CODE ANN. (1930) § 1279.

[7]The statute first appeared in MISS. CODE (1857) c. 64. art. 302.

[8]Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[9]Strauss v. State, 58 Miss. 55 (1880).

[10]Hill v. State, 152 Miss. 708, 120 So. 817 (1929). The state may not cross-examine the accused on his application for a continuance.

law, the rules and considerations are, with few exceptions, found to be the same in both civil and criminal cases.

II. *The Application And Its Consideration*

Formalities of Application

The proper method of presenting an application for continuance is by motion and affidavit. The motion is brief and formal.[11] The affidavit attached to the motion is the important thing. It may be made either by the litigant or his attorney or by both, depending upon who has personal knowledge of the facts. It must set forth: (1) The name and residence of the absent witness, (2) the facts which he expects to prove by his absent witness or documents, (3) that he has exercised due diligence to procure the absent evidence, stating in what the diligence consists, and (4) that the continuance is not sought for delay only, but that justice may be done.[12]

The enumerated requirements of the affidavit are hereinafter discussed in some detail. Unless these formalities are observed, the court is justified in denying the application at the outset, and, unless there is a hearing upon the application and any deficiencies therein are supplied by proof, the action of the trial court in denying the continuance will invariably be affirmed. On the other hand, if the affidavit meets all requirements of the statute and sufficiently states facts to warrant a continuance, the applicant has made a prima facie showing, which entitles him to a continuance unless rebuttal proof is offered.

Name and Residence of Absent Witnesses

The affidavit must state the name and residence of the absent witness. The purpose of the requirement that the residence of the witness be disclosed is that the court may determine the probability of having the witness present at a future term.

Non-Resident Witnesses. If the witness is shown to be a non-resident of the state or permanently absent therefrom, the application will generally be denied.[13] In civil, as distinguished from criminal, cases, the party is

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[11]Montgomery v. State, 85 Miss. 330, 37 So. 835 (1904), "The docket is called for trial or continuance, and it is not incumbent on him who makes the application to ask postponement to a future day of the same term. The court may do so on application for continuance if the condition of the public business or the situation of that particular case makes it advisable."

[12]Miss. Code Ann. (1930) § 576.

[13]Turner v. State, 177 Miss. 272, 171 So. 21 (1936); Cox v. State, 138 Miss. 370, 103 So. 129 (1925); Knox v. State, 97 Miss. 523, 52 So. 695 (1910); Cade v. State, 96 Miss. 434, 50 So. 554 (1909); Hill v. State, 152 Miss. 708, 120 So. 817 (1909); Richberger v. State, 90 Miss. 806, 44 So. 772 (1907); Donald v. State, 41 So. 4 (Miss. 1906), citing Lamar v. State, 63 Miss. 265 (1885); Carberry v. Worrell, 68 Miss. 573, 9 So. 290 (1891) (involving a transient witness, without business or other ties in the state, whose whereabouts were unknown at the time of the application)

entitled as a matter of right to take the deposition of non-resident witnesses,[14] but unless this right is seasonably exercised, the litigant is not entitled to a continuance.[15] In criminal cases, however, there is no provision for the taking of depositions,[16] and accordingly, cases may arise wherein manifest injustice would result from denial of the defendant's application.[17] Hence, a continuance should be granted to procure the attendance of a vital witness, although he is shown to be a non-resident, provided the applicant can give the court reasonable assurance that the witness will be produced at a subsequent term of the court;[18] as where the applicant has communicated with the witness and obtained his promise of voluntary appearance at a subsequent term.[19] In such cases, however, a showing of the utmost good faith is required, and, if the case is once continued for this reason, only the most unusual and compelling circumstances would warrant a second continuance.

Resident Witnesses. On the other hand, while the court will not ordinarily be required to grant a continuance if the witness is beyond the jurisdiction of the court, yet when it is shown that he resides in the state and is only temporarily absent and beyond the jurisdiction of the court, and that his presence can probably be obtained at the next term, the fact that the witness is beyond the reach of compulsory process at the time of the application is not alone sufficient reason to deny the continuance. If all other requirements are met, the application must be sustained.[20] The applicant must affirmatively show either that the witness was at no time subject to compulsory process, but he was subpoenaed and thereafter absented himself,[21] or that although process was not served, the applicant was not negligent in this regard.[22]

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[14]Miss. Code Ann. (1930) § 1542.

[15]Christian & Craft Co. v. Dantzler Lumber Co., 78 Miss 740, 28 So. 788 (1900); Worsham v. McLeod, 11 So. 107 (Miss. 1891); Gastrell v. Phillips, 64 Miss. 473, 1 So. 729 (1886).

[16]Gastrell v. Phillips, 64 Miss. 473, 1 So. 729 (1886); Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[17]Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941); Knox v. State, 97 Miss 523, 52 So. 695 (1910).

[18]Hill v. State, 152 Miss. 708, 120 So. 817 (1929); Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941).

[19]Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941). In Woodward v. State, 89 Miss. 348, 42 So. 167 (1906), trial was set for eight days after the indictment was returned. A witness who resided in another county had not been served with process and was absent. The defendant's attorney made affidavit that he "had written that he was willing to appear and testify, and that he would have said witness on hand at the next term of the court." *Held*: A continuance should have been allowed. Strauss v. State, 58 Miss. 33 (1880) was distinguished.

[20]Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941); Knox v. State, 97 Miss. 523, 52 So. 695 (1910); Cade v. State, 96 Miss. 434, 50 So. 544 (1909).

[21]Bedford v. Gartrell, 36 So. 529 (Miss. 1904).

[22]Cantrell v. Peugh, 149 Miss. 21, 115 So. 116 (1927); Thomas v. State, 61 Miss. 60 (1883); Gibson v. State, 59 Miss. 341 (1881); Grangers Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446 (1879).

Testimony of Absent Witness

The applicant must set forth in his affidavit the facts which he expects to prove by the absent witness or documents. This requirement of the statute has been construed to mean that the facts must be stated in detail and not merely by way of conclusion.[23] For instance, it is not sufficient to state merely that the absent witness or documents, if present, would establish some particular theory of the applicant's case or disprove some theory advanced by the opposing party, but the affidavit must state the facts in order that the court may determine for itself the conclusions to be draw therefrom.[24]

This requirement is strictly enforced to the end that the court may determine at least three material questions: (1) Whether the evidence actually exists, (2) whether it is material, and (3) whether it is merely cumulative.[25] Some courts add a fourth: whether the evidence is reasonably believable.[26]

Existence of Evidence. Fundamental principles of fairness as well as due process of law require that a defendant be given a reasonable time within which to prepare his defense. But subject to the right of a defendant to have a reasonable time within which to search for exculpating evidence and obtain process for witnesses, an application for continuance, after the expiration of such reasonable time, merely for the purpose of searching for evidence not known to exist will generally be denied, and properly so. Thus, where a defendant sought to delay only for the purpose of securing the presence of a witness to ascertain whether he knew material facts, it was held that the trial court was justified in denying the application.[27]

Materiality of Evidence. The testimony of the absent witness must be material to the issues in the case.[28] And by this is meant that the evidence must be germane to the ultimate issues of fact. Thus a continuance is properly denied where the only effect of the testimony of the absent witness would be to impeach the credibility of some witness offered by the

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[23]Woulard v. State, 137 Miss. 808, 102 So. 781 (1925); Ware v. State, 133 Miss. 837, 98 So. 229 (1903); King v. McWorther, 173 Miss. 852, 173 So. 679.

[24]*Ibid.*

[25]These subjects are hereinafter treated in detail.

[26]12 AM. JUR. (Continuances) § 26.

[27]Richberger v. State, 90 Miss. 806, 44 So. 772 (1907). *Accord:* Sanders v. State, 141 Miss. 289, 105 So. 523 (1925) (where the defendant sought delay in order to investigate an audit on which an indictment for embezzlement was based, but, on the trial, admitted substantially every item of the audit); Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890) (defendant under indictment for embezzlement sought time in which to have an audit of books made, but upon the complete trial, appeared to be manifestly guilty and his contentions concerning what would be shown by the proposed audit appeared frivilous and without merit.)

[28]Woulard v. State, 137 Miss. 808, 102 So. 781 (1925); Ware v. State, 133 Miss. 837, 98 So. 229 (1923).

opposing party,[29] as by showing that the witness for the opposing party is unworthy of belief because of his reputation or otherwise.[30]

On the other hand, if the testimony of the absent witness is shown to be material within the intent of the rule stated above and it is not merely cumulative within the rule discussed in the next succeeding section, the court may not, upon the application, properly inquire into its probable weight with the jury,[31] unless, of course, it clearly appears that the testimony would be manifestly incredible.[32]

Cumulative Evidence. It has been stated that a continuance will not be granted for the production of merely cumulative evidence.[33] The term is clearly defined in cases relating to the granting of new trials for the production of newly discovered evidence, and the rule against granting such new trials for the production of merely cumulative evidence is strictly enforced.[34] However, the term as used in cases relating to continuance is given an altogether different meaning. In fact, its use in this connection only serves to create confusion and misunderstanding. In order to clarify the situation as far as possible, an attempt will be made to define the term as it is used and understood in connection with both of the subjects mentioned above.

New Trials For Newly Discovered Evidence. In a leading case the court used this language:[35] "What does the legal mind understand by the words 'cumulative evidence?' Simply this: That cumulative evidence is evidence of the same kind as that already given to the same point. Evidence of any disputed fact having been offered by showing particular circumstances, any evidence which only shows the same circumstances is purely cumulative. Evidence which would tend to establish the disputed fact by other circumstances is not cumulative, but corroborative, in the sense in which that word is used."[36]

Evidence which is not cumulative is clearly illustrated in an early case.[37] There was an action in assumpsit on a bill of exchange, and the

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[29]See Redmond v. Marshal, 162 Miss. 359, 137 So. 733 (1931); Bailey v. State, 94 Miss. 863, 48 So. 227, 20 L.R.A. (N.S.) 409 (1909); Vandenburg v. Campbell, 64 Miss. 89, 8 So. 206 (1886); Moore v. Chicago, St. L. & N. O. Ry., 59 Miss. 243 (1881).

[30]Impeachment is here used as distinguished from contradition. A witness who testifies to material facts and thereby incidently contradicts another witness is not within the rule stated.

[31]Scott v. State, 80 Miss. 197, 31 So. 710 (1902).

[32]12 Am. Jur. (Continuances) § 26.

[33]Long v. State, 52 Miss. 23 (1876).

[34]*Cf.* Mallard v. State, 174 Miss. 231, 164 So. 405 (1935) (material facts appeared only from testimony of defendant in criminal case).

[35]Louisville, N. O. & T. Ry. v. Crayton, 69 Miss. 152, 12 So. 271 (1891).

[36]Redmond v. Marshall, 162 Miss. 359, 137 So. 733 (1931); Ennis v. Yazoo & M. V. Ry., 118 Miss. 509, 79 So. 73 (1918); Williams v. State, 99 Miss. 274, 54 So. 857 (1911); Vandenburg v. Campbell, 64 Miss. 89, 8 So. 206 (1886); Vardeman v. Byrne, 7 How. 365 (Miss. 1843).

[37]Vardeman v. Byrne, 7 How. 365 (Miss. 1843).

issue presented was whether or not the defendant signed the instrument. Three witnesses for the defendant testified that they had not witnessed the execution of the instrument involved, but that on the day on which it was dated and claimed to have been signed by the defendant, they knew that the defendant was in Tennessee. There was a verdict and judgment for the plaintiff, after which there was a motion for a new trial on the ground that the witness had been discovered who actually saw the instrument executed by a person other than the defendant. The court held that the evidence of the newly discovered witness was not merely cumulative, since it was not of the same or similar character as that already produced. The fact that the newly discovered evidence went to establish the same issue did not bring it within the definition of merely cumulative evidence. To make it so, the evidence must not only tend to establish the same issue presented on the trial, but it must be of the same character as that already produced or be directed to the same or similar circumstances already produced to establish the issue.

On the other hand, evidence which is cumulative within the definition and rule is illustrated in several of the more recent cases.[38] In one case it is said that evidence which simply increases the weight of testimony already introduced is cumulative.[39] In another well considered case,[40] the court observed that newly discovered evidence which merely corroborates the testimony of some witness who testified on the trial but presents no new circumstances or evidence of a different character to establish the point in issue is purely cumulative, and if made the basis for a new trial, it would cause no end of litigation, since such evidence may be discovered in almost every trial.[41]

Applications for Continuance. In this field, different considerations of policy lead to a more liberal rule. The extent of the rule excluding cumulative evidence as a ground for continuance is and should be carefully limited to those cases wherein the facts about which the absent witness would testify are established on the trial by other witnesses or from other sources, without substantial conflict or dispute, or where the court may say with confidence that the applicant has not been harmed by a denial of the application on review of the completed record.[42]

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[38]See *supra* note 36.

[39]Louisville, N. O. & T. Ry. v. Crayton, 69 Miss. 152, 12 So. 271 (1891).

[40]Ennis v. Yazoo & M. V. Ry., 118 Miss. 509, 79 So. 73 (1918).

[41]There is an exception to the general rule. Thus, in Mallard v. State, 174 Miss. 231, 164 So. 405 (1935), it was held that where material facts appear on the trial only from testimony of the defendant in a criminal case, the rule denying a new trial for merely cumulative evidence newly discovered does not apply, if the newly discovered evidence corroborates the testimony of the accused. Noting a conflict of authority, it was pointed out that the rule adopted here is in accord with "both reason and justice," since the defendant's "interest in the verdict was great."

[42]Note (1925) 41 A. L. R. 1530 (proof of alibi in criminal case). Ordinarily a continuance will be granted to procure the attendance of absent witness to establish an alibi, although several witnesses are offered upon the same point. This is es-

The reason for this is apparent. Where the fact in question is substantially contradicted or disputed, evidence to support one or the other of the contradictory versions is of the greatest importance. Of course, such evidence is of no less importance to the litigant when discovered only after the completed trial, but the considerations which govern the court are different. When the evidence is offered for the first time after the completed trial, the first consideration is the policy of putting an end to litigation, and the case should be reopened only for the most compelling reasons.[43] On the other hand, the application for continuance is presented before the trial begins and is not overshadowed by the aforementioned policy. It is therefore viewed with greater favor.

Two propositions are established beyond debate: (1) Where the facts about which the absent witness would testify are proven on the trial from other sources without substantial conflict or dispute, a continuance is properly denied,[44] but (2) where all other conditions are met, it is error to deny a continuance in the event that the facts to be proven by the absent witness can be established from no other available source.[45]

Between the two extremes, there is a middle ground which is not free from difficulty. In one case it is said that, if the evidence to be given by the absent witness is material, its probable weight with the jury is not a proper subject of inquiry by the court.[46] In a later case it is observed that the applicant who has been denied a continuance must show, in order to obtain a reversal on this ground, that an affirmative action would probably have brought about a different result in the outcome of the trial; in other words, that the action of the trial court was harmful.[47]

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pecially true where the witnesses present are related to the accused. Frank Baimonte v. State, 101 Tex. Crim. Rep. 622, 276 S.W. 921, 41 A. L. R. 1527 (1925); *cf.* Hatfield v. Com., 21 Ky. L. Rep. 1461, 55 S.W. 679 (1900) (absent witness related to the accused and present witness not). The rule has its limits. State v. Hillstock, 45 La. Ann. 298, 12 So. 352 (1893). Twenty-four witnesses were subpoenaed to establish an alibi and all appeared but two. The court held that the application was properly denied.

There is no good reason why the authorities cited should not apply equally to any material issue. The same considerations appear in both civil and criminal cases.

[43]Dement v. Sumner, 175 Miss. 290, 165 So. 791 (1936).

[44]Long v. State, 52 Miss. 23 (1876).

[45]Walker v. State, 129 Miss. 449, 92 So. 580 (1922); Dobbs v. State, 96 Miss. 786, 51 So. 915 (1910); State v. Vollm, 95 Miss. 651, 51 So. 275 (1910). The same rule applies where the facts in question can be established only by the accused in a criminal case. This is true whether the accused takes the witness stand or not, unless, of course, the accused does take the stand and there is no substantial contradiction of his testimony or dispute about the fact in question.

[46]Scott v. State, 80 Miss. 197, 31 So. 710 (1902).

[47]Tanner v. Wade, 153 Miss. 197, 121 So. 156 (1929). The application here was for the purpose of permitting the defendant a reasonable time to prepare his defense. The court in affirming a judgment for the plantiff said of the defendant's application, "His defense appears to have been well planned and well conducted. There was nothing to show that delay in the trial would have developed any additional facts favorable to appellant's defense." In view of this holding, the language of the court, discussed *supra*, seems to go beyond the necessity of the case.

These cases cannot be reconciled if the burden of showing prejudice is placed upon the applicant to the extent of demonstrating that the result of the trial would have probably been different. The true test is this: If the evidence of the absent witness is material, all other conditions being met, the applicant is prima facie entitled to a continuance. If, upon the completed trial,[48] the court can say with confidence that the applicant was not prejudiced, giving due regard to the province of the jury in passing upon the weight of the evidence, the action should be affirmed. This is true without regard to whether the evidence is "cumulative" as that term is commonly understood.

Exercise of Diligence

The applicant must set forth in his affidavit that "he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists."[49] It is not sufficient merely to state that the applicant has exercised diligence, for this would amount to nothing more than a conclusion. The affidavit must state the facts.

On the first application for a continuance, it is said that the applicant must show that he has exercised "reasonable diligence."[50] If the first application is granted and a second one is made at the next term of court, then what is termed the "utmost diligence" may be required.[51] It is certain that the second application is viewed with more disfavor than the first, and the intensity of the disfavor may be said to increase with each additional application.

Such diligence must appear from the affidavit. If the application is denied, although improperly so, the applicant must continue to exercise diligence to procure the evidence upon the trial, and if unsuccessful, then upon motion for a new trial.[52]

Requisites of Diligence. The applicant, as soon as possible, should issue summons for his witnesses. For those served who fail to appear, he should seek an attachment, which the court will readily grant. For those not served with process, he should make a diligent inquiry to ascertain their whereabouts and the likelihood of procuring their attendance at the current term of the court. If the witness cannot be procured, the applicant should state the facts showing diligence in his affidavit and

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[48]If the application shows a *prima facie* right to continuance, it should be granted. If improperly denied, the question of prejudice is determined from a review of the completed trial. Long v. State, 52 Miss. 23 (1876).

[49]Miss. Code Ann. (1930) § 576.

[50]Watts v. State, 90 Miss. 757, 44 So. 36 (1907).

[51]Williams v. State, 92 Miss. 70, 45 So. 146 (1908).

[52]See cases cited *infra* note 55.

disclose therein with particularity the steps taken to obtain the presence of the witness and the reasons, if known, for the absence of the witness.[53]

If the application is denied, the applicant must take further steps. He should sue out other process for the witness, if not previously served, and continue in his efforts to obtain the presence of the witness. If the first application is made before the day of trial, it should be renewed on the day of trial with a supporting affidavit, showing the facts as then existing. If the applicant is put to trial, he should continue in his efforts throughout the trial.[54]

If the verdict is against the applicant and he has not been able to obtain the presence of the absent witness on the trial, he must take still further steps to preserve the point for appeal. He must persist in his efforts to obtain the presence of the witness before the expiration of that term of court. But whether the presence of the witness be obtained or not, a motion for a new trial is absolutely indispensable to review of the trial court's action.[55]

On motion for a new trial, the witness must be produced, or if his personal attendance cannot be secured after diligent effort, which diligence must affirmatively appear, the ex parte affivadit of the witness must be produced if practicable, stating the facts about which the witness would testify if present. If such affidavit is impracticable or cannot be obtained, the reasons must be made to appear.[56]

It is observed that the continuance of the applicant's efforts as outlined above may not be excused upon a showing merely that success would be improbable, for in any event, the duty of making the effort is upon the applicant.[57]

Summons for Witness. In demonstrating diligence, the applicant must show that a subpoena has been issued and served or show good cause why it has not been done. This is the first and most important requirement. Negligence or lack of the utmost good faith in this regard will justify the court in denying the application.

Good Faith

It is hardly necessary to say that the applicant must exercise good faith in all stages of the procedure. The statute requires that the appli-

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[53]Lamar v. State, 63 Miss. 265 (1885).
[54]*Ibid.*
[55]Weaver v. Phares, 183 Miss. 735, 184 So. 833 (1938); Cox v. State, 138 Miss. 370, 103 So. 129 (1925); Ware v. State, 133 Miss. 837, 98 So. 229 (1923); Lamar v. State, 63 Miss. 265 (1885).
[56]*Ibid.*
[57]Lamar v. State, 63 Miss. 265 (1885).

cant state in his affidavit "that the continuance is not sought for delay only, but that justice may be done."[58]

In this connection, the affidavit should negative the idea that the witness is absent with the defendant's procurement or consent.[59]

III. *Hearing on Application.* The statute provides that:

> "The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court."[60]

Discretion of Trial Court

The most frequently mentioned reason for sustaining the action of the trial court in overruling a motion for continuance is that the matter lies within the discretion of the court.[61] It is said that "the granting of continuances is so largely within the discretion of the trial court that a refusal to grant a continuance is rarely a ground for reversal. There must be an abuse of discretion on the part of the trial court to work a reversal."[62] Various expressions have been adopted to denote the weight to be attached to the trial court's judgment. Thus it is said that no reversal will result unless there appears to have been a "clear,"[63] "palpable"[64] or "extreme"[65] abuse of discretion, or, as stated in one case, unless the action of the trial court is "manifestly wrong."[66]

However, the discretion of the trial court is not absolute in the sense that it is not subject to review. To the contrary, there must be a sound

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[58]Miss. Code Ann. (1930) § 576.

[59]Lamar v. State, 62 Miss. 265 (1885); *cf.* Bowme v. State, 103 Miss. 628, 60 So. 724 (1912), where the defendant voluntarily consumed large quantities of whisky, whereby he was incapacitated from attending court. It was held that the application was properly denied.

[60]Miss. Code Ann. (1930) § 576.

[61]King v. McWorther, 174 Miss. 187, 163 So. 679 (1935); Tanner v. Wade, 153 Miss. 722, 121 So. 156 (1929); Continental Ins. Co. v. Brown, 142 Miss. 199, 106 So. 633 (1925); Sanders v. State, 141 Miss. 289, 105 So. 523 (1925); Cox v. State, 138 Miss. 370, 103 So. 129 (1925); Williams v. State, 92 Miss. 70, 45 So. 146 (1907); Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1898); Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890).

[62]Sanders v. State, 141 Miss. 289, 105 So. 523 (1925); Tanner v. Wade, 153 Miss. 722, 121 So. 156 (1929); Cox v. State, 138 Miss. 370, 103 So. 129 (1925).

[63]Continental Ins. Co. v. Brown, 142 Miss. 199, 106 So. 633 (1925).

[64]Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890).

[65]Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1898).

[66]Williams v. State, 92 Miss. 70, 45 So. 146 (1907); *cf.* Tanner v. Wade, 153 Miss. 722, 121 So. 156 (1929).

exercise of the power, and where, from the entire record on the completed trial, there appears to have been a clear abuse of discretion, resulting in prejudice or injustice,[67] the appellate court will not hesitate to reverse.[68] The test applied in determining whether there is an abuse of discretion is hereinafter discussed.

Evidence on Hearing

"The court may . . . of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied." For the purpose of such cross-examination, the statute further provides that: "No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court."[69]

As heretofore observed, the affidavit on application for continuance, if in proper form and containing a sufficient showing, prima facie entitles the applicant to prevail on his motion. This showing may be rebutted either by cross-examination or other evidence.

Cross-examination of Applicant

The statute quoted in the next preceding section, at least in so far as the provision for cross-examination is concerned, is not applicable in criminal cases, where the party making the affidavit is the accused or his attorney. To construe the statute otherwise would render it unconstitutional.[70] It is held that the accused in a criminal case has the right to

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[67]Miss. Code Ann. (1930) § 576; Cox v. State, 138 Miss. 370, 103 So. 129 (1925); "In ruling on motions for a continuance, the circuit judge is usually in a better position to judge the propriety of continuing or refusing to continue a case, and it is only where a person . . . can make a showing that injustice resulted or that he was prejudiced by such ruling, that this court can interfere with such discretion of the trial judge." *Cf.* Tanner v. Wade, 153 Miss. 722, 121 So. 156 (1929).

[68]Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941); Johnson v. State, 108 Miss. 709, 67 So. 177 (1914); Hoggett v. State, 99 Miss. 844, 56 So. 172 (1911); Carter v. State, 100 Miss. 342, 56 So. 454 (1911); Corbin v. State, 99 Miss. 486, 55 So. 43 (1911); Dobbs v. State, 96 Miss. 786, 51 So. 915 (1910); Knox v. State, 97 Miss. 523, 52 So. 695 (1910); State v. Vollm, 96 Miss. 651, 51 So. 275 (1909); Magee v. State, 91 Miss. 505, 45 So. 360 (1907); Watts v. State, 90 Miss. 757, 44 So. 36 (1907); Woodward v. State, 89 Miss. 348, 42 So. 167 (1905); Montgomery v. State, 85 Miss. 330, 37 So. 835 (1905); Walton v. State, 87 Miss. 296, 39 So. 689 (1905); Caldwell v. State, 85 Miss. 383, 37 So. 816 (1904); Scott v. State, 80 Miss. 197, 31 So. 710 (1902); Watson v. State, 81 Miss. 700, 33 So. 491 (1902); Hubbard v. State, 64 Miss. 315, 1 So. 480 (1886): "The discretion must be a sound judicial discretion having due regard to the right of the public and of the defendant.

[69]Miss. Code Ann. (1930) § 576.

[70]Hill v. State, 152 Miss. 708, 120 So. 817 (1928); Sanders v. State, 141 Miss. 289, 105 So. 523 (1925); *see* Hubbard v. State, 64 Miss. 315, 1 So. 480 (1886).

make his affidavit and stand upon it,[71] and he may not be questioned as to its truth or falsity.[72] If it is desired to controvert the truth of the affidavit, it must be done by other means than an examination of the accused.[73]

However, a violation of the rule against cross-examination over objection of the accused does not necessarily constitute reversible error, unless the error is prejudicial. Thus, where the affidavit is insufficient, the fact that the accused is cross-examined over objection is not necessarily reversible error.[74]

On the other hand, where, looking at the record as a whole, the affidavit is sufficient but for the contradictory statements of the accused on being compelled over his protest to testify, the conviction should be reversed; for otherwise the result would be to deny to the accused a vital constitutional right. Moreover, the state may not compel the accused to testify on the application and thereafter on the trial prove his statements before the jury by other witnesses.[75]

Other Evidence

The ordinary strictness of the rules of evidence are relaxed on applications for continuance, and a wide range of inquiry is allowed. One case has even gone so far as to state that the trial judge may apply his own personal knowledge of the existence of the facts in the absence of proof,[76] but obviously the statement is incorrect, since all subsequent decisions are to the effect that the case must be determined upon the record as made. Otherwise, the trial court's discretion would be absolute and its decision would not be reviewable.

Evidence in the form of reports and certificates of physicians, at least when authenticated and supported by oath, may be received upon the issue of whether an absent party or witness is physically able to attend

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[71]But the state may examine the witness if produced upon a subsequent trial as to the truth of the affidavit and thereby take advantage in argument of all the inferences deducible from the false affidavit. *See* McLeod v. State, 130 Miss. 83, 92 So. 828 (1922).

[72]Of course, if the accused voluntarily takes the stand, he may be cross-examined as in other cases. The extent of the rule is that he does not waive his privilege by making the affidavit.

[73]Hubbard v. State, 64 Miss. 315, 1 So. 480 (1886).

[74]Hill v. State, 152 Miss. 708, 120 So. 817 (1928).

[75]Hubbard v. State, 64 Miss. 315, 1 So. 480 (1886). In this case the state compelled the accused to testify on his application and obtained from him statements tending to show the facts as set forth in his affidavit would not be established by the absent witness. The state then admitted that the witness, if present, would testify as set forth in the affidavit and agreed that it might be read to the jury. On the trial, the prosecuting attorney was allowed over objection to call the attorney for the accused and prove by him the statements made by the accused on the hearing of the application. It did not appear that the accused took the stand on the trial. *Held:* Reversible error.

[76]Strauss v. State, 58 Miss. 53 (1880).

the trial.[77] Not only may such reports and certificates be received when offered by the applicant, but the court may of its own motion appoint physicians to examine the absent party and receive and act upon their testimony in the form of sworn written reports.[78] It is held that such affidavits are not subject to obligation on the ground that the right of cross-examination, or in a criminal case the additional right of the accused to be confronted by the witnesses against him, is denied; for the asserted rights are applicable only on trial of the merits.[79] Admittedly, however, the better practice is to require the personal attendance and oral testimony of the witness where possible.[80]

In some states it has been held that opposing affidavits cannot be used to contradict the statements in the affidavit of the applicant as to what the testimony of the absent witness would be if present, although such affidavits are admissible for other purposes, such as showing want of diligence.[81] But in this state, the statute under consideration seems broad enough to admit counter affidavits for any relevant purpose. Such affidavits are admitted simply "for the purpose of showing to the court that the continuance should be denied." No substantial right is denied the applicant, although the opportunity of cross-examination is unavailable.

Time For Passing On Application

The court should rule upon the application upon the record as made upon the hearing of the motion.[82] If at that time it appears that the applicant is entitled to a continuance, it should be promptly granted. The trial court's refusal of the application at this stage is frowned upon as "at least, a very dangerous exercise of its power."[83] However, if the application is improperly denied on the hearing, the action is reviewed upon the entire record. In other words, the case will not be reversed for the trial court's initial error, unless from the entire record upon the completed trial, the appellate court can say that there was an abuse of discretion.

IV. *Admission of Facts as Avoiding Continuance*

Frequently, the opposing litigant is willing to admit, in order to avoid the granting of a continuance, that the absent witness, if present,

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[77]Polk v. State, 106 Miss. 518, 64 So. 215 (1913); Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1898); *cf.* Coleman v. Bowman, 135 Miss. 137, 99 So. 465 (1924).

[78]Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1898).

[79]*Ibid.*

[80]*Ibid.*

[81]See 12 Am. Jur. (Continuances) § 41; State v. Belvell, 89 Iowa 405, 56 N. W. 545, 27 L.R.A. 846 (1893).

[82]Long v. State, 52 Miss. 23 (1876). The court held that the denial of the application was error, but since upon the trial the evidence set forth in the affidavit proved to be merely cumulative, the error was harmless.

[83]*Ibid.*

would testify as stated in the movant's affidavit. The effect of such admission as avoiding a continuance differs in civil and criminal cases.

The following discussion of the subject assumes that a proper and sufficient showing has been made for a continuance. The question is the effect of an admission by the opposing party that the absent witness, if present, would testify as alleged in the affidavit of the applicant.

Civil Cases

It is the general and well established practice in civil cases for the court to deny applications for continuance, upon an admission by the opposing party that the absent witness, if present, would testify as alleged. By this practice the applicant is often-times placed at a disadvantage, in that he is denied use of the more effective oral testimony.[84] The prejudice thus resulting, however, is not considered substantial, and the rule is now too well settled for debate. Of course the admission does not concede the truth of the facts, but only that the absent witness would testify to those facts if present. The absent witness may be contradicted upon the trial and even impeached.

Criminal Cases

The more serious questions arise in criminal cases, where the disadvantage to the accused in being denied the benefit of oral testimony is subject to greater judicial concern. By statute[85] in derogation of the common law[86] it is made lawful for the state to admit the testimony of the absent witness, but this right is limited and carefully restricted. By the statute, the admission "shall have the same effect as if the absent witness or other evidence were present in court, and no more," but "if compulsory process will probably obtain the attendance of the absent witness, and the defendant have not had opportunity of obtaining such process, the cause shall be continued, unless the defendant desire a trial."[87] The burden of showing the existence of these conditions is upon the defendant.[88]

Prior to the enactment of the statute in 1857[89] in substantially its present form, the court had held that the practice of allowing the state in criminal cases to avoid a continuance by admitting the testimony of the absent witness was improper and not to be encouraged.[90] It was further held that once such admission had been made and a continuance improperly

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[84]*Cf.* Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[85]Miss. Code Ann. (1930) § 1279.

[86]Strauss v. State, 58 Miss. 53 (1880); Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[87]This proviso was necessary to save the statute from constitutional objections. See 12 Am. Jur. (Continuances) § 47. *Cf.* Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[88]See Strauss v. State, 58 Miss. 53 (1880).

[89]Miss. Code (1857), c. 64, § 302.

[90]Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

denied upon the basis thereof, it constituted an admission of the facts as absolutely true and beyond contradiction.[91] The reasons given were that the accused was entitled to have the witness present in person pursuant to the policy of criminal jurisprudence; for, it was said, "Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony."[92]

The obvious purpose of the statute was to change the common law rule thus established.[93]

Although the statute governing criminal cases changed the common law rule to permit an admission of testimony in a certain limited class of cases, the field of its application is indeed narrow.[94] Even in those instances where the statute is said to apply, it will be found upon a careful examination of the facts, that the continuance was properly denied upon other sufficient grounds.

Thus, if it appears that the witness is within the jurisdiction of the court but is unable to attend because of illness, the defendant upon proper showing is entitled to a continuance, which cannot be denied upon the admission of testimony by the state.[95] In such cases, the court frequently emphasizes the fact that process was served by way of subpoena,[96] but the absence of such process is not necessarily fatal.[97] The only requirement of the statute is that the defendant make it appear that "compulsory process will probably obtain the attendance of the absent witness;"[98] to which is added by judicial interpretation—"at a subsequent term of the court."[99] In other words, the failure of the defendant to exercise diligence to obtain the absent witness may serve as a valid ground for denying the continuance, but such will not bring the statute into operation. Of course, if a continuance is properly denied upon other grounds, the admission of the testimony of the absent witness by the state cannot prejudice the defendant.

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[91] *Ibid.* This was said to be the only fair substitute for the presence of the witness.

[92] Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[93] Strauss v. State, 58 Miss. 53 (1880).

[94] *Ibid.*

[95] Walker v. State, 129 Miss. 449, 92 So. 580 (1922); State v. Vollm, 95 Miss. 651, 51 So. 275 (1909) (process served); Caldwell v. State, 85 Miss. 383, 37 So. 816 (1904); Watson v. State, 81 Miss. 700, 33 So. 491 (1902); Scott v. State, 80 Miss. 197, 31 So. 710 (1902); Long v. State, 52 Miss. 23 (1876).

[96] See cases cited *infra* note 97.

[97] Brooks v. State, 108 Miss. 571, 67 So. 53 (1914) (witness recently discovered in another county); Dobbs v. State, 96 Miss. 786, 51 So. 915 (1910) (subpoena returned "not found"); Know v. State, 97 Miss. 23, 52 So. 695 (1910) (witness temporarily absent); Magee v. State, 91 Miss. 505, 45 So. 360 (1908) (witness alleged to be within reach of process); Woodward v. State, 89 Miss. 348, 42 So. 167 (1906) (witness in another county, but had assured defendant of presence at next term); Walton v. State, 87 Miss. 296, 39 So. 689 (1905) (general rule stated).

[98] Miss. Code Ann. (1930) § 1279.

[99] See cases cited *supra* note 95.

If the absent witness is shown to be permanently beyond the jurisdiction of the court, a continuance may ordinarily be denied for this reason alone. But if it be further shown that the voluntary attendance of the witness can be procured at a subsequent term, the granting of a continuance on this ground can be avoided by an admission of the testimony by the state, since compulsory process will not obtain the witness.[100]

If a continuance in a criminal case is improperly denied upon the admission of testimonial facts contained in the affidavit, the error is fatal. A conviction will accordingly be reversed for the error in denying a continuance: unless upon the trial it appears that other and sufficient grounds for denying the continuance existed; as where the testimony of the absent witness proves to be immaterial or merely cumulative.[101] Morever, the error is not cured by the action of the defendant in reading the affidavit to the jury with the admission of the state in reference thereto.[102]

Instruction on Weight of Admission

If a denial of a continuance is obtained upon the admission of testimony, the party admitting the testimony may not, in argument before the jury, refer to the weakness of the testimony on the ground that it is in the form of an affidavit, as by referring to the absent witness as a "paper witness."[103] Moreover, the applicant who offers the affidavit containing the testimony of the absent witness is entitled to an instruction to the effect that the jury must give the same weight to such testimony as they would give it had the witness been before them on the stand, testifying under oath.[104] The refusal of such an instruction is reversible error. It is said that the instruction is "eminently proper" where the absent witness is the only one for the defendant,[105] and upon principle, the same consideration would apply where the witness, although not the only witness, is of vital importance to the litigant.[106]

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[100]Richberger v. State, 90 Miss. 806, 44 So. 772 (1907).

[101]Another exception would occur if the defendant failed to exercise diligence after the application was denied to procure the attendance of the witness on the trial. The requirement of diligence does not end when the application is overruled.

[102]Scott v. State, 80 Miss. 197, 31 So. 710 (1902).

[103]Lee v. State, 75 Miss. 625, 23 So. 628 (1898); *accord,* Smith v. State, 90 Miss. 111, 43 So. 465 (1909). In this last mentioned case, the lower court permitted the state, after admitting the testimony of the absent witness to obtain a continuance to show that the defendant had failed to introduce the witness on a previous trial of the same case, although he was then available. A conviction was reversed. Referring to the evidence introduced by the state on this point, the court said: "It could have no sort of bearing on the credibility of the absent witness, but was a direct assault on the defendant's affidavit for the continuance; and this was not a trial for perjury in making the affidavit, Scott v. State, 80 Miss. 197, 31 So. 710 (1902), and was an overload on the accused." But see *infra* note 109.

[104]Lee v. State, 75 Miss. 625, 23 So. 628 (1898).

[105]*Ibid.*

[106]Dobbs v. State, 96 Miss. 786, 51 So. 915 (1910).

It has been held that the instruction is not subject to criticism as being a comment upon the weight of the evidence, since it merely states the statutory rule of law upon the subject.

Effect of Admission on Second Trial[107]

On clearest principle and for obvious reasons, the admission of testimony does not extend beyond the trial for which the admission is made. Should the case result in a mistrial or should a new trial be had, the defendant cannot rely upon his former application or upon the admission by his adversary upon the former trial. The admission of testimony is only for the purpose of avoiding a continuance upon the first trial and is not binding thereafter.[108]

If, upon the second trial, the witness is produced he may be cross examined as in other cases. Moreover, he may be questioned as to the truth or falsity of the averments contained in the applicant's affidavit setting forth the facts about which the witness would testify, for the purpose of showing the falsity thereof.[109]

Contradiction and Impeachment of Absent Witness

Of course, the opposing party, in both civil and criminal cases, may contradict the ultimate facts sought to be established by the absent witness, for otherwise the admission would be conclusive.[110] However, once the testimony set forth in the applicant's affidavit is admitted in evidence, the opposing party may not directly attack the affidavit, as by proof that if the absent witness were present, he would not testify as set forth therein;[111] nor may the testimony be unfavorably compared in argument

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[107]The same considerations apply in both civil and criminal cases.

[108]See 12 Am. Jur. (Continuances) § 48, and cases cited: Padgett v. Moll, 159 Mo. 143, 60 S.W. 121 (1900); Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 A. S. R. 854 (1902); Yellow Taxicab Co. v. Cooke, 171 Okla. 269, 42 P. (2d) 826 (1913).

[109]McLeod v. State, 130 Miss. 83, 92 So. 828 (1922). This case involved such cross-examination where the case was continued for one term upon the defendant's application. The witness was thereafter produced at a later term of the court. Although the court does not discuss reasons for the holding, it may be justified upon the ground that the evidence thus adduced tends to show a willingness upon the part of the defendant to falsify facts under oath, from which an unfavorable inference may be drawn. Of course, the inference may be counteracted by proof of good faith, mistake or other plausible excuse. Also, a deliberately false affidavit may bear the inference that the defendant was conscious of guilt.

[110]Brent v. Heard, 43 Miss. 370 (1870). See Miss. Code Ann. (1930) § 1279, abolishing the rule of Dominges v. State, 7 S. & M. 475, 45 Am. Dec. 315 (Miss. 1846).

[111]Hubbard v. State, 64 Miss. 315, 1 So. 480 (1886). To thus induce the defendant to go to trial by admitting that the absent witness would testify as set forth in the affidavit and afterwards "destroy its effect as evidence by proving statements in conflict with it," displays an intolerable mark of injustice. This is especially true in criminal trials.

with oral testimony; nor is proof admissable that the witness was available on a previous trial and was not then used by the applicant.[112]

Several interesting questions arise in regard to impeachment of the absent witness by the generally recognized methods; none of which appear to have been expressly decided. May the absent witness be impeached (1) by proving his own prior contradictory statements, or (2) by showing his conviction of an infamous crime, or (3) by attacking his general reputation for truth and veracity? On principle, the first two questions must be answered in the negative, since both methods of impeachment require a predicate, which cannot be laid in the absence of the witness. The last question finds no precise answer in the cases upon the subject, but there seems to be no good reason why the credibility of the witness may not be thus attacked. By admitting the testimony, the admitting party does not concede the credibility of the absent witness, and the right of impeachment should not be denied except for the most compelling considerations of policy, which considerations do not exist in the instances under discussion.

V. *Other Methods of Avoiding Continuance*

Except by the admission of the adverse party that an absent witness if present would testify as set forth in the affidavit of the applicant, there appears to be no method of avoiding a continuance where the proper showing therefor is made. An interesting case was presented in one instance where the lower court, upon the defendant's application showing that a material witness in a criminal case was ill and unable to attend the trial, adjourned, over the objection of the defendant, to the home of the witness and there tendered the witness to the defendant for examination. The action was held to be reversible error.[113] The reasoning of the court was that under the law the trial must be had at the courthouse at the county site, and it is not within the spirit and genius of the law that the court should migrate from place to place. It appears that the situs of the court is jurisdictional; from which it follows that error thus committed is not subject to waiver.[114]

VI. *Review*

Element of Discretion

A substantial majority of the cases appealed from action of the trial court in denying applications for continuance are affirmed, and almost with-

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[112]Smith v. State, 90 Miss. 100, 43 So. 465 (1907); Scott v. State, 80 Miss. 197, 31 So. 710 (1902). However, such considerations are held to be appropriate on the hearing of the application for a continuance. See Strauss v. State, 58 Miss. 53 (1880).

[113]Carter v. State, 100 Miss. 342, 56 So. 454, Ann. Cas. 1914 A. 369 (1911).

[114]*Ibid.;* accord, Jones v. State, 141 Miss. 894, 107 So. 8 (1925); Sexton v. Coahoma County, 86 Miss. 380, 38 So. 636 (1905); Harris v. State, 72 Miss. 960, 18 So. 387, 33 L. R. A. 85 (1895); Hanley v. Medford, 56 Or. 171, 108 Pac. 118 (1910) (quoted with approval in Jones v. State, *supra.*)

out exception mention is made of the rule that the matter rests within the *sound discretion* of the trial court.[115]

It is impossible to define the phrase "sound discretion" so as to make it apply to all cases alike,[116] and no precise definition is to be desired.

It is in the determination of facts to support the various elements which make the continuance a matter of right that the trial court is said to exercise a sound discretion, rather than in the interpretation of the facts once shown to exist. For example, if it is shown that a proper affidavit and application is filed, that all due diligence has been exercised, that the testimony of the witness is material, and not merely cumulative, that he is within the jurisdiction of the court, that he has been served with a subpoena, but is unable to attend because of illness, the continuance becomes a matter of right. But in determining the essential elements of diligence, materiality and the other factors, the trial court hears the evidence, observes the demeanor of the witnesses, if any, and draws therefrom conclusions of fact. These conclusions are, of course, entitled to great weight, even as the conclusions of the jury in a litigated case. If the trial court is found on appeal to have been manifestly wrong in the conclusions reached, the case must be reversed. Otherwise, an affirmance follows.

Record of Review

The propriety of the trial court's action in denying a continuance must be determined by the appellate court upon the completed trial and in the light of the entire record.[117] Where a proper showing is made, the trial court should promptly grant the continuance upon the preliminary hearing, and its refusal under such circumstances is not only error, but is said to be at least a very dangerous exercise of its powers.[118] The reason is apparent.[119] The error is not reversible, however, unless it appears upon the completed trial that the denial resulted in prejudice, or that the continuance was properly denied upon consideration of the question in the full light of the completed record of the trial.

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[115]Continental Ins. Co. v. Brown, 142 Miss. 199, 106 So. 633 (1925); Sanders v. State, 141 Miss. 289, 105 So. 523 (1925); Cox v. State, 138 Miss. 370, 103 So. 129 (1924); Williams v. State, 92 Miss. 70, 45 So. 146 (1902); Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1899); Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890).

[116]Williams v. State, 92 Miss. 70, 45 So. 146 (1907).

[117]Sanders v. State, 141 Miss. 289, 105 So. 523 (1925); Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890); Long v. State, 52 Miss. 23 (1875).

[118]Long v. State, 52 Miss. 23 (1875) (evidence shown to be merely cumulative upon review of entire record).

[119]Mistrials are expensive both to the state and the defendant. To deny a continuance upon a proper showing therefor upon the preliminary hearing is unjust to the defendant, productive of justifiable criticism and expensive to the taxpayers. Long v. State, 52 Miss. 23 (1875).

Curing Error on Trial

Should the continuance be erroneously denied upon the preliminary hearing, the error may be proved to be harmless, or it may be cured or waived upon the trial of the case upon the merits. Thus, cases will be affirmed:

(1) Where the application is based upon the alleged inablility of the defendant to attend his trial and testify in his own behalf, and he thereafter appears on the trial and testifies with clearness and obvious mental acuteness.[120] (2) Where the testimony of the absent witness proves, upon the trial, to be merely accumulative.[121] (3) Where the evidence alleged to be available from absent documents or proof is shown upon the trial to be vain or fanciful.[122] (4) Where the testimony of the absent witness is shown to be immaterial.[123] (5) Where the applicant admits on the trial all the facts alleged to be disputed by the absent witness.[124]

The error may be waived by the failure of the applicant to continue throughout the trial to use the necessary diligence to procure the presence of the absent witness, or the failure of the applicant to present the matter anew by motion for a new trial after the conclusion of the trial.

Motion for New Trial

In the absence of the motion for a new trial, the error of the trial court in denying a continuance is waived, and the applicant has no right to have the appellate court review the action of the trial court.[125] This is a just requirement, which follows from the rule that the trial court's action must be viewed upon the entire record after the completed trial. The motion is necessary in order to give the trial court an opportunity to correct its error and pass upon the questions thus for the first time presented.[126]

On motion for a new trial, the application must in substantial effect be renewed and properly supported by affidavit and proof.[127]

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[120]Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1899).

[121]Long v. State, 52 Miss. 23 (1875).

[122]Hemingway v. State, 68 Miss. 371, 8 So. 317 (1890).

[123]Woulard v. State, 137 Miss. 808, 102 So. 781 (1924); Ware v. State, 133 Miss. 837, 98 So. 229 (1923). In such cases, it cannot be said that injustice resulted from the denial, which is of course, necessary to secure a reversal. Miss. Code Ann. (1930) § 576.

[124]Sanders v. State, 141 Miss. 289, 105 So. 523 (1925).

[125]Weaver v. Phares, 183 Miss. 735, 184 So. 833 (1938); Cox v. State, 138 Miss. 370, 103 So. 129 (1924); Ware v. State, 133 Miss. 837, 98 So. 229 (1923); Lamar v. State, 62 Miss. 265 (1884).

[126]*Ibid.*

[127]*Ibid.* On motion for a new trial, the witness must be produced, or if this cannot be done, his *ex parte* affidavit must be offered, and if neither the witness nor his affidavit is available, the reasons must be made to appear. The reason for this requirement is to make it appear that the applicant has exercised the utmost good faith and diligence. The original application would seem sufficient to demonstrate the materiality of the testimony and substance thereof.

VII. *Absence of Party Litigant*

Generally the same rules govern and apply to the granting or denial of a continuance because of the absence of a party litigant as apply in the case of a witness who is not a party. The situation, however, is not exactly the same. The absence of a party litigant, even in a civil case, may be ground for a continuance, although he is not a witness.

Although it is conceded that a continuance is proper in some cases for the absence of a litigant who is not a witness, it must be shown upon the application that his presence is necessary for the proper presentation of the case, and this must be shown clearly and not merely by way of conclusion, but by evidence justifying such conclusion.[128] If the absence of the party as a witness be the ground, the application must generally conform to the requirements in other cases where the absent witness is not a litigant.[129] Of course, if the absence is voluntary or not absolutely necessary, the continuance is properly denied.[130]

In criminal cases, the accused has the constitutional right to be present and be confronted by the witnesses against him. Accordingly, it is unnecessary to show that his presence is necessary for the proper presentation of the case. But the accused cannot obtain a continuance where his absence is voluntary.[131]

VIII. *Revocation of Order*

Since the trial court has control over its orders and judgments during the term of court at which they are entered, an order granting an application for continuance may be withdrawn; but upon the clearest principles of fairness, a party, having acted upon the original order and departed from the court, is entitled to rely upon the original order until the next term of court, unless he is served with timely notice of any motion to set aside the order or the action of the court thereon. In the absence of such notice, a judgment procured by the adversary party will be reversed on appeal.[132]

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[128]King v. McWhorter, 174 Miss. 187, 163 So. 679 (1934); *citing*: Coleman v. Bowman, 135 Miss. 137, 99 So. 465 (1924); Ware v. State, 133 Miss. 837, 98 So. 229 (1923).

[129]*Ibid.*

[130]Bourne v. State, 103 Miss. 628, 60 So. 724 (1912). In Simmons v. State, 71 Miss. 567, 14 So. 461 (1894) it was shown that in the opinion of a physician, it would be "better for appellant to remain at home, unless he had imperative business elsewhere." The court held that the result of attendance must be shown to be "hurtful."

[131]Johnson v. State, 108 Miss. 709, 67 So. 177 (1914) (continuance allowed); Bourne v. State, 103 Miss. 628, 60 So. 724 (1912) (continuance denied); Corbin v. State, 99 Miss. 486, 55 So. 43 (1910) (continuance allowed); Lipscomb v. State, 76 Miss. 223, 25 So. 158 (1899) (denial affirmed); Simmons v. State, 71 Miss. 567, 14 So. 461 (1893) (continuance denied).

[132]Willsford v. Meyer-Kiser Corp., 139 Miss. 387, 104 So. 293 (1925). A judgment by default will be reversed unless notice of the revocation of the previous order affirmatively appears.

CONTINUANCE TO AFFORD TIME TO PREPARE FOR TRIAL

The constitution[133] guarantees to every person a fair and impartial trial, and such includes a reasonable opportunity to prepare for trial.[134] Ordinarily this principle cannot be invoked in a civil case as a basis of continuance, since the statutes afford ample time within which to prepare a defense. On the other hand, in criminal cases the accused may be arraigned and immediately put to trial. Therefore, upon application in a criminal case, the accused is entitled to a postponement or continuance if such is necessary to afford him a reasonable time to prepare his defense.[135] The right extends to afford the accused an opportunity to procure the attendance of absent witnesses, though the witnesses may be out of the jurisdiction of the court, provided reasonable assurance is given that they will voluntarily appear.[136]

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[133]Miss. Const. (1890) § 26.
[134]Cruthirds v. State, 190 Miss. 892, 2 So. (2d) 145 (1941).
[135]*Ibid.*
[136]*Ibid.*

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